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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-935

THE CHICAGO BOARD OF HEALTH, and DR. ERIC OLDBERG, SAMUEL A. GOLDSMITH, WALTER MULLADY, DR. MARY KELLY MULLANE, DR. ROBERT STEPTO, EDWARD W. HUSSEY, and MICHAEL ROSENBERG, Individual Members of the Chicago Board of Health,

Petitioners,

vs.

FRIENDSHIP MEDICAL CENTER, LTD. and T. R. M. HOWARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioners, The Chicago Board of Health and Dr. Eric Oldberg, Samuel A. Goldsmith, Walter Mullady, Dr. Mary Kelly Mullane, Dr. Robert Stepto, Edward W. Hussey, and Michael Rosenberg, Members of the Chicago Board

of Health, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered October 30, 1974.

OPINIONS BELOW

The Opinion of the Court of Appeals, filed on October 30, 1974, has not yet been officially reported, but it is reproduced in Appendix A to this petition.

The Memorandum Opinion and Order of the District Court are reported at 367 F.Supp. 594 (N.D. Ill. 1973) and are reproduced in Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on October 30, 1974. This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether this Court's holding that a woman's right of privacy is broad enough to encompass her decision to have an abortion renders unconstitutional Board of Health regulations, which establish minimum health and sanitation standards for abortion clinics.

2. Whether the fundamental right of personal privacy should be expanded to incorporate the right of a woman to be free from municipal regulations that exist for the sole purpose of guarding the physical health of abortion patients.

3. Whether the compelling state interest standard is an appropriate measure of the constitutionality of health and sanitation standards applicable to abortion clinics that perform first trimester abortions.

4. Whether municipal health and sanitation requirements that apply to abortion clinics performing second trimester abortions are presumptively valid in the face of a constitutional attack.

5. Whether a physician has standing to challenge health regulations on the grounds that they unconstitutionally restrict his patients' rights of personal and marital privacy, where he has not been charged with any violation of the regulations, where he is in compliance with the regulations, and where his patients are able to assert and protect their rights without his assistance.

BOARD OF HEALTH REGULATIONS INVOLVED

The Chicago Board of Health regulations for abortion services appear as Appendix C to this petition.

STATEMENT OF THE CASE

Respondent Friendship Medical Center, Ltd. is a medical corporation that owns and operates a facility offering abortion services to pregnant women. Respondent Howard is the president of Friendship, a member of its board of directors, and a physician who practices through the facilities which Friendship operates. The petitioners, the Chicago Board of Health and the individual members of the Chicago Board of Health, are charged with the primary responsibility for the health of the people of the City of Chicago and have the duty to enact rules and regulations necessary to preserve the public health. No abortion clinic patient is a party to this lawsuit.

Respondents brought suit seeking a declaration that the abortion services regulations promulgated by the Chicago Board of Health are unconstitutional and an injunction against their continued enforcement. Jurisdiction in the district court was invoked pursuant to 28 U.S.C. 1331 and 28 U.S.C. 1343(3).

In general, the challenged regulations are health and safety measures which prescribe the conditions and procedures under which abortions may be performed in the City of Chicago. The regulations require that all abortions be performed by a licensed physician in a facility that complies with their provisions. Each such facility must have a knee- or foot-controlled sink immediately adjacent to the operating room, an elevator that can accommodate a stretcher if the facility is above ground level, equipment and supplies maintained in proper working order, and suitably furnished waiting and dressing rooms. (Abortion Services Regulations, Sections I, VI, VIII and IX.) Abortion services which are not located in a hospital must have an affiliation agreement with one, and organized transportation facilities

capable of insuring that a patient requiring emergency hospital care can be transported to an affiliated hospital within a total transport time of fifteen minutes. (Abortion Services Regulations, Section VII.) The regulations also require certain pre-operative procedures, such as the obtaining of a complete medical history, certain laboratory tests, and a twenty-four hour waiting period between the initial examination and the termination of the pregnancy. (Abortion Service Regulations, Sections XVI (c) and XVI (e).) In addition, certain registration, record-keeping and reporting requirements are imposed. (Abortion Services Regulations, Sections IV (a) and IV (b).) The regulations provide for the closing of any abortion service which violates their provisions.

The district court held that respondents do not have standing to litigate the alleged violations of their patients' rights of personal and marital privacy, and that the Board of Health can constitutionally prescribe the facilities and procedures in clinics where abortions are performed. An order was then entered in accordance with these holdings.

The United States Court of Appeals for the Seventh Circuit reversed, holding that the respondents have standing to raise their patients' rights; that during the first trimester of pregnancy, the fundamental right of privacy includes the right to be free from the challenged regulations; that the challenged regulations failed to meet the compelling state interest test; that regulation of abortion facilities where first trimester abortions are performed must be limited to the general requirement of sanitary facilities and minimal building code standards; and that health and sanitation regulations governing second trimester abortions cannot be sustained merely because they are reasonably related to a valid health purpose. Petitioners seek review of this judgment.

REASONS FOR GRANTING THE WRIT

I.

THE ISSUE OF WHETHER A WOMAN'S RIGHT OF PRIVACY LIMITS REGULATION OF ABORTION FACILITIES TO MAINTENANCE OF SANITARY FACILITIES AND ENFORCEMENT OF BUILDING CODE STANDARDS IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The crucial problem raised by the decision of the Court of Appeals in the instant case is the scope of the fundamental right of privacy. In *Roe* v. *Wade*, 410 U.S. 113, 154, 155 (1973), this Court held that "the right of privacy is broad enough to encompass a woman's decision to terminate her pregnancy" and that regulations limiting a woman's fundamental right of privacy in this area may be justified only by a "compelling state interest." In discussing the line of cases defining the right of privacy that exists under the Constitution, this Court made it clear that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' [citations omitted] are included in this guarantee of personal privacy." 410 U.S. at 152.

The Court of Appeals for the Seventh Circuit has determined that the fundamental right of privacy includes the right to be free from health and sanitation requirements which do not affect the decision to terminate a pregnancy, but which prescribe the conditions that must be maintained at facilities offering abortion services. Without citing a constitutional mandate for its decision, the Court of Appeals

has somehow identified a woman's fundamental right to an abortion in a facility that is unsanitary or that is not properly staffed or equipped.

The challenged regulations do not govern the abortion decision, but rather, the medical facilities offering abortion services. Therefore, this Court's historic ruling in *Roe* v. *Wade*, 410 U.S. 113 (1973) and *Doe* v. *Bolton*, 410 U.S. 179 (1973) does not require the decision reached by the Court of Appeals in this case. In *Roe* and *Doe*, this Court was confronted with criminal abortion statutes which rendered illegal the entire abortion procedure, and this Court did not have to direct its attention to the issue of permissible regulation of abortion clinics.

The Court of Appeals justifies its expansive interpretation of the right of privacy by the fact that the challenged regulations necessarily affect the manner in which the abortion will take place and, therefore, the way in which a woman will exercise her right to an abortion. By reason of its broad definition of the fundamental right of privacy, the Court of Appeals has ignored the lesson of *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973), where this Court rejected the argument that education is among the rights entitled to fundamental protection by the Constitution.

In that case, it was argued that education is itself a fundamental right because education inevitably affects the manner in which the fundamental right to speak and to vote can be utilized. This Court refused to elevate education to fundamental right status despite the necessary relationship between education and other fundamental rights. While this Court commented that it had long protected the right to speak and to vote, this Court declared it did

not guarantee a particular type of speech or quality of electoral choice.

Absent a constitutional mandate, this Court declined to recognize any fundamental right to an education regardless of the influence of education on the right to speak and to vote. Admittedly, the challenged regulations do affect the setting in which the fundamental right to an abortion is exercised. Thus, in some sense, the regulations affect the right to an abortion. However, the regulations in no way limit the right to decide to terminate a pregnancy and actually secure that right. Therefore, under the rationale of *Rodriguez,* the Court of Appeals erred when it held that the fundamental right of privacy includes the right to be free from the challenged regulations.

Language in *Roe* and *Doe* lends strong support to the view that the Court of Appeals' definition of the right of privacy is constitutionally unauthorized. In *Roe* v. *Wade*, this Court acknowledged the existence of a legitimate governmental interest in minimizing any potential risk to the patient's safety arising from the abortion procedure:

> ". . . of course, important state interests in the area of health and medical standards do remain. The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, *is performed under circumstances that insure maximum safety for the patient.* This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. *The prevalence of high mortality rates at illegal 'abortion mills' strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed.*" 410 U.S. at 150. (Emphasis added.)

Moreover, this Court specifically held that states may forbid all abortions performed by persons other than licensed physicians. 410 U.S. at 165. Such a holding seems to support the view that throughout pregnancy, the concern for maternal health obviously justifies some governmental regulation over where, how and by whom an abortion may be performed.

The opinion in *Doe* v. *Bolton* also appears to indicate that regulation of facilities offering abortions during the first trimester is both appropriate and valid:

> ". . . the State must show more than it has in order to prove that only the full resources of a licensed hospital rather than those of some other *appropriately licensed institution,* satisfy these health interests." 410 U.S. at 195. (Emphasis added.)

Given such language, it is reasonable to conclude that the Board of Health is justified in its limited regulation of the abortion procedure during the first trimester notwithstanding a woman's right to decide to terminate her pregnancy. Moreover, these passages from *Roe* and *Doe* certainly give support to the position, rejected by the Court of Appeals, that a municipality may regulate the abortion procedure at least to the extent it regulates other medical operations of equal dangerousness. In any event, the above-quoted language indicates that this Court did not intend to preempt the regulation of abortion clinics by local health officials.

The Court of Appeals chose to disregard the preceding language that supports the type of regulations enacted by the Chicago Board of Health. Rather, in voiding the City of Chicago's health and sanitation standards for abortion services, the Court of Appeals seized upon the following language from *Roe* v. *Wade*:

> ". . . With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at 149, that until the end of the first trimester mortality in abortion may be less than mortality in natural childbirth." 410 U.S. at 163.

It is obvious that the factual underpinning for this Court's holding that, during the first trimester, the state has no interest in interfering in the abortion decision cannot be used to support the decision that the challenged Board of Health regulations are constitutionally impermissible.* In *Roe* v. *Wade*, this Court relied on a number of authorities to support its finding that during the first trimester, the abortion procedure is now relatively safe. *Roe* v. *Wade*, supra, at p. 149, n. 44.

Significantly, the sources on which this Court relied report studies based on abortions performed in hospitals or approved extramural facilities. None of the studies report statistics on abortions performed in extramural facilities

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* Of course, the use of comparative mortality figures as the only constitutionally relevant measure of state abortion regulation has met with criticism. See Tribe, *Forward: Toward A Model Of Roles In The Due Process Of Life And Law*, 87 Harv. L. Rev. 4 (1973). Moreover, at least one commentator has pointed out that the relative safety of abortions does not support the inference that regulations designed to make abortion procedures safer during the first trimester are impermissible. Ely, *The Wages Of Crying Wolf: Roe* v. *Wade*, 82 Yale L. J. 120 (1973).

that are not subject to careful regulation,* and this Court never made any findings with regard to the safety of abortions performed in the absence of health and sanitation requirements. Indeed, in *Roe* v. *Wade*, this Court quoted the Standards for Abortion Services adopted by the American Public Health Association:

> ". . . for pregnancies in the first trimester, abortion in the hospital with or without overnight stay is 'probably the safest practice.' An abortion in an extramural facility, however, *is an acceptable alternative provided arrangements exist in advance to admit patient to the hospital promptly if unforeseen complications develop.*" 410 U.S. 145-46 (emphasis added).

However, the Court of Appeals has expanded a woman's right of privacy, defined by this Court as encompassing the

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* This is true of all the authorities cited in footnote 44 of *Roe* v. *Wade*. For example, Potts, *Postconceptive Control Of Fertility*, 8 Int'l. J. of G. & O. 957 (1970), deals with abortions in the United Kingdom, where abortions may only be performed in hospitals or facilities approved by the Minister of Health. (Supplementary Appendix to Brief for Appellants, *Roe* v. *Wade*, p. 445.) Tietze, *United States: Therapeutic Abortions, 1963-1968*, presents figures compiled by the Commission on Professional and Hospital Activities based on studies of hospital records. At the time the study *Morbidity and Morality* was published by H.E.W., in those places where abortion clinics were legally permissible, they were subject to careful regulation by boards of health. (Abortion Service Regulations of the City of New York, Supplementary Appendix to Brief of Appellants, *Roe* v. *Wade*, p. 11; Abortion Regulations Adopted by the Washington State Board of Health, *Id.* at p. 17.) The remaining articles deal with abortions performed in Eastern Europe. In Czechoslovakia and Hungary, for example, abortions must be performed in approved hospitals. (Id. at 445.) Thus, there were no studies showing the safety of unregulated abortion clinics before this Court.

abortion decision, to include freedom from basic health and safety requirements. If the factual basis for this Court's definition of the right of privacy was the relative safety of the abortion procedure, it follows that the Court of Appeals has made the judgment that the abortion procedure is safe even in the absence of any regulation by local health officials. This judgment must be recognized for what it is, a serious assumption made by the Court of Appeals without any basis in the record before it.

The test traditionally applied in the area of health regulation is whether or not the challenged law bears a rational relation to a valid state objective. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955). The Court of Appeals admitted that the challenged regulations are probably rationally related to a legitimate governmental interest. However, a necessary result of the Seventh Circuit's definition of the fundamental right of privacy was its application of the strict scrutiny test to the Board of Health regulations as they apply to first trimester abortions. In addition, the Court of Appeals declined to give the regulations, as they apply to second trimester abortions, the usual presumption of validity in the face of constitutional attack.

Application of the compelling state interest standard to the Board of Health regulations serves to highlight the overbreadth of the Court of Appeals' definition of the right of privacy. In the form of substantive due process, the Court of Appeals is, in effect, second guessing the judgment of medical officers charged with the grave responsibility of protecting the health of the citizens of Chicago. It is submitted that the Court of Appeals erred in applying a more stringent standard than rationality to the Board of Health regulations.

The Court of Appeals' holding that regulation of abortion services must be limited to "general requirements as to the maintenance of sanitary facilities and compliance with minimal building code standards" creates profound doubts as to whether the traditional police power of state and local boards of health may have any application whatsoever to first trimester abortions.* In *Roe* v. *Wade*, this Court indicated that there was a valid governmental interest in insuring the "maximum safety" of the abortion patient. 410 U.S. at 150. The duty of the Chicago Board of Health, to enact rules and regulations governing the sanitary conditions and public health of the City of Chicago, seems to mandate the careful regulation of abortion clinics. The tragic history of the illegal "abortion factories" of the past amplifies the need to regulate abortion clinics that have been established in the wake of *Roe* v. *Wade*. However, the decision below appears to frustrate any effort by health officials to insure the safety of abortion patients.

Many of the abortion clinics that have been established have the capacity to treat a large number of women. The pre- and post-abortion care of the patients is necessarily delegated to non-physicians. Thus, the Board of Health

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* Judge Fairchild felt sufficiently disturbed by this holding to write in a separate opinion that ". . . the majority indicates, apparently as dictum, that any general regulation of a broad class of medical and surgical procedures within which abortion would fall must satisfy a 'compelling governmental interest requirement' before it can be applied to abortions during the first trimester and therefore would probably be limited to general sanitary and structural codes.' *I do not believe that Roe requires such a result. . . .*" *Friendship Medical Center* v. *Chicago Board of Health*, *supra*, at 241 (emphasis added).

cannot rely on the sound medical judgment of an attending physician to insure the health and safety of abortion clinic patients. According to the Court of Appeals for the Seventh Circuit, the Board of Health is nevertheless powerless to require that the medical services being offered at abortion clinics do not endanger the health of the public. Review of this decision will be of great aid to the petitioners and to many other litigants as well. The petitioners are representative of many health officials who are uncertain as to the permissible scope of regulation of abortion procedures and the facilities during the first trimester of pregnancy* and the appropriate measure of the constitutionality of such regulations.

The Court of Appeals erred in applying the strict scrutiny test to the Chicago Board of Health regulations. The compelling interest doctrine exists to protect basic human rights from infringement. Thus, defining the limits of those fundamental rights is of crucial importance. In *Roe*, this Court held that the right of privacy was broad enough to encompass the *abortion decision*. The expansive interpretation the Seventh Circuit has given the right of privacy warrants review by this Court.

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* The public officials who were responsible for the regulatory legislation which was invalidated in *Word* v. *Poelker*, 42 U.S.L.W. 2448 (8th Cir., Feb. 20, 1974) and *Hallmark Clinic* v. *North Carolina*, No. 74-27 Civ. 5 (E.D. N.C., Feb. 19, 1974) argued that their regulatory legislation was valid under *Roe* v. *Wade* and *Doe* v. *Bolton*.

II.

THE SEVENTH CIRCUIT'S HOLDING THAT THE PLAINTIFFS BELOW HAD STANDING TO RAISE THEIR PATIENTS' RIGHTS OF PERSONAL AND MARITAL PRIVACY ALLOWS IMPORTANT CONSTITUTIONAL RIGHTS TO BE LITIGATED BY PARTIES WHO DO NOT POSSESS SUCH RIGHTS THEMSELVES AND LACK ANY SUBSTANTIAL PERSONAL INTEREST IN THE OUTCOME OF THE LITIGATION.

It is significant that this challenge of the City of Chicago's Board of Health regulations for abortion services is brought, not by an abortion clinic patient, but by a private physician and an abortion clinic. No woman has argued that the City's health and sanitation requirements violate her right of privacy. However, the respondents seek declaratory and injunctive relief on behalf of patients who are able to assert and protect their rights in the courts.

The Court of Appeals held that the respondents have standing to litigate the rights of abortion clinic patients. In so holding, the Court of Appeals ignored the rule of *Tileston* v. *Ullman*, 318 U.S. 44 (1943), where this Court recognized that a physician may not assert the rights of his patients in an action to declare a state anti-birth control statute unconstitutional. In *McGowan* v. *Maryland*, 366 U.S. 420 (1961), this Court noted at page 429 that the appellants had alleged "only economic injury to themselves"; the Court went on to state that:

> ". . . they do not allege any infringement of their own religious freedoms . . . Since the general rule is that 'a litigant may only assert his own constitutional rights or immunities' [citation omitted], we hold that appellants have no standing to raise this contention." *Id.*

Later that same term, the Court stated in *Poe* v. *Ullman*, 367 U.S. 497 (1961), that:

> "The various doctrines of 'standing', 'ripeness' and 'mootness' . . . are but several manifestations . . . of the primary conception that federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action." 367 U.S. at 504.

The Court of Appeals has, to a very substantial degree, ignored these rules by allowing a physician to raise his patients' rights of privacy, though his patients are well able, should they desire, to raise those rights themselves.

In holding that the respondents have standing to challenge the Board of Health regulations, the Court of Appeals paid no heed to the "case or controversy" requirement imposed by Article II of the Constitution. At all times during the course of this litigation, respondents have been registered with the Chicago Board of Health and have met the Board's requirements for abortion services. Respondents have not been threatened with arrest or prosecution. As in *McGowan* v. *Maryland*, *supra*, the respondents sole stake in the outcome of the litigation is economic. Moreover, like the physician in *Poe* v. *Ullman*, *supra*, the respondents have not demonstrated that they have been immediately threatened with harm.

No genuine controversy exists between the parties. The Court of Appeals has rested its judgment upon the speculative fears of the respondents. However, this case is not transformed into a real controversy simply because respondents, whose own constitutional rights are not in issue, "feel inhibited" by the Board of Health regulations

with which they are in compliance. See *Younger* v. *Harris*, 401 U.S. 37 (1971) and *Golden* v. *Zwickler*, 394 U.S. 103 (1969). It is respectfully submitted that if the Seventh Circuit's holding is allowed to stand, important constitutional rights will be litigated by parties whose only stake in the definition of those rights or the resolution of the issues involved is economic, since their *own* rights are not at issue. This would result in the court deciding the issue without the aid, argument and viewpoint of a party whose rights are actually involved.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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January 27, 1975

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 74-1070

FRIENDSHIP MEDICAL CENTER, LTD. and T.R.M. HOWARD,

Plaintiffs-Appellants,

v.

THE CHICAGO BOARD OF HEALTH, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division — No. 73 C 1965
Richard B. Austin, *Judge.*

ARGUED SEPTEMBER 11, 1974 — DECIDED OCTOBER 30, 1974

Before SWYGERT, *Chief Judge,* FAIRCHILD and SPRECHER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* The question presented is whether the Chicago Board of Health may promulgate and enforce regulations which describe in substantial detail conditions, equipment, and procedures that medical facilities offering abortions must comply with, without regard to the trimester of pregnancy involved.

I

Friendship Medical Center, Ltd. is a medical corporation organized pursuant to the laws of Illinois, which owns and operates a medical facility that offers abor-

tions to pregnant women. Plaintiff Howard is the president of Friendship, a member of its board of directors, a shareholder, as well as a physician who practices through the facilities which Friendship operates. The defendants are the Chicago Board of Health and the members of that Board.

Plaintiffs brought this suit for alleged violations of 42 U.S.C. § 1983[1] seeking an injunction against enforcement, and a declaration that the regulations promulgated by the defendant are unconstitutional. Plaintiffs-appellants appeal from the decision of the district court denying them standing to assert as one of the grounds for invalidating the regulations a woman's fundamental right of privacy, and the order granting the defendant's motion to dismiss for failure to state a claim upon which relief could be granted. *Friendship Medical Center, Ltd. v. Chicago Board of Health*, 367 F. Supp. 594, 607 (N.D. Ill. 1973).[2]

The plaintiffs urge on this appeal that: (a) they have standing to challenge the abortion regulations on the grounds that the regulations unconstitutionally restrict their patient's rights to personal and marital privacy; (b) the abortion regulations are an invalid and overbroad

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[1] 42 U.S.C. § 1983 reads as follows:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2] The district court determined that it had jurisdiction over the cause pursuant to 28 U.S.C. § 1331, 367 F. Supp. at 598-99, and the defendants have not pressed this point on appeal. The district court also rejected the defendants' contention that the case was moot because the plaintiff had in fact complied with the challenged regulations. The court found that the regulations had "a continuing regulatory effect on the plaintiffs" and thus rejected the mootness claim. 367 F. Supp. at 601. As with the jurisdictional claim, the defendants have abandoned this argument on appeal.

enactment infringing unreasonably upon fundamental rights because of their failure to exclude the first trimester; and (c) they are invalid because of their stringent and sweeping requirements which are not legitimately related to recognized governmental objectives to protect maternal health.[3]

The defendants contend that not only do the plaintiffs lack standing, but also that the Supreme Court's recent abortion decisions do not proscribe attempts by state or local governments to impose safety regulations that are reasonably related to their interest in protecting the health of those seeking abortions.

On January 22, 1973 the United States Supreme Court rendered its landmark decisions on abortion. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973). Shortly thereafter in May of 1973 the defendants adopted Regulations for Abortion Services for the City of Chicago.[4]

The regulations require that an abortion be performed by a licensed physician and in a facility that complies with its provisions. Each facility is required to keep records in regard to the admission and discharge of patients, medical histories, results of tests, social services offered and other patient progress notes. Chicago Board of Health Regulations on Abortion Services, section IV(a), [hereinafter cited as Abortion Regulations]. It must also prepare monthly reports which are to include the number of patients that requested, and were either given or denied abortions, and the name and address of patients who developed complications following the abortion and a description of such complications. Abortion Regulations, *supra*, section IV(b).

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[3] Because of our disposition of the case, we have found it unnecessary to consider appellants' arguments that the abortion regulations deny procedural due process and are unduly vague.

[4] The regulations have been set out as an appendix to the district court's opinion. *Friendship Medical Center, Ltd. v. Chicago Board of Health*, 367 F. Supp. 594, 608-21 (N.D. Ill. 1973).

All equipment and supplies must be maintained in proper working order, and necessary solutions, drugs and medications must be available. There must be a knee or foot controlled sink immediately adjacent to the room where the abortion is performed, an elevator that can accommodate a stretcher if any abortion service is located above ground level, anesthesia and such other equipment as is necessary to treat for hemorrhage, shock, cardiac arrest, and other emergencies. Abortion Regulations, *supra*, sections VI, VIII, IX(c). Each abortion service is required to have facilities for registration, medical evaluation and examination, post-operative recovery and suitable furnishings and accommodations, including waiting and dressing rooms. Abortion Regulations, *supra*, sections IX, XII.

In addition every non-hospital abortion service must have a written affiliation agreement with a licensed Chicago hospital allowing the use of its laboratory facilities and providing for the treatment of its patients requiring emergency care. The abortion service must have immediately available organized transportation facilities capable of transporting patients to the affiliated hospital within fifteen minutes. Abortion Regulations, *supra*, sections I(d), VII, X. The regulations also require that an abortion service be supervised by a physician who is either a qualified obstetrician or surgeon;[5] that there be at least one registered professional nurse with post graduate experience in obstetric or gynecological nursing on duty at all times while the abortion service is in use and that there be a social service unit available to the patients of the service. Abortion Regulations, *supra*, sections XIII(b), XIV(b), XV.

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[5] The terms qualified obstetrician and qualified surgeon are defined as follows:

Qualified Obstetrician means:

(1) A licensed physician who is a diplomate of the American Board of Obstetrics and Gynecology; or who submits evidence to the Chicago Board of Health that his training and experience qualify him for admission to the examination by such Board; or

(2) A licensed physician who is a Fellow of the American College of Surgeons in the specialty of Obstetrics and

Finally, the Chicago Board of Health requires that a complete medical history be obtained including not only a pelvic examination but also the following laboratory tests on every patient: hematocrit, Rh factor, complete urinalysis and blood grouping. Abortion Regulations, *supra*, section XVI(c). There is also required to be an interval of at least twenty-four hours between the initial examination and the termination of the pregnancy to permit review of all laboratory tests "and to permit and encourage thorough consideration and a firm decision by the patient regarding termination of pregnancy." Abortion Regulations, *supra*, section XVI(e).

The regulations themselves provide for the closing of any abortion service that either fails to register or which, if it continued in operation would be in violation of any of the Board of Health's regulations. Abortion Regulations, *supra*, section XIX. In addition certain of the named defendants, as well as other employees of the

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Gynecology; or The American College of Obstetrics and Gynecology.

(3) A Doctor of Osteopathy who holds a license to practice medicine in the State of Illinois and who is certified by the American College of Osteopathic Obstetricians and Gynecologists, or who submits evidence to the Chicago Board of Health that his training and experience qualify him for admission to the examination by such Board, or who submits evidence of completion of an approved residency in obstetrics and gynecology.

Qualified Surgeon means:

(1) A licensed physician who is a Diplomate of the American Board of Surgery, or who submits evidence to the Chicago Board of Health that his training and experience qualify him for admission to the examination by such Board; or

(2) A licensed physician who is a Fellow of the American College of Surgeons; a Doctor of Osteopathy who holds a license to practice Surgery in the State of Illinois and who is certified by the American College of Osteopathic Surgeons, or who submits evidence to the Chicago Board of Health that his training and experience qualify him for admission to the examination by such Board or who submits evidence of completion of an approved residency in surgery.

Abortion Regulations, *supra*, sections I(f), (g).

defendant Board have been given "full police powers" as well as the "right to arrest" any individual that does not comply with the provisions of the health code.[6] MUNICIPAL CODE OF CHICAGO, ch. 9, § 5.

II

The district court while allowing the plaintiffs to challenge the Abortion Regulations on substantive and procedural due process and equal protection grounds, refused to allow them to attack the regulations as violative of a woman's right of privacy as delineated in *Roe* and *Doe*. *Friendship Medical Center, supra* at 600. In our view the district court viewed plaintiffs' right to challenge the Board of Health's regulations too narrowly.

The initial inquiry in determining if the plaintiffs have the requisite standing to maintain this action is whether they have alleged such a personal stake in the outcome of the controversy so as to assure that there exists "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). In the present case it is clear that both the individual and corporate plaintiff have a sufficient interest at stake to allow them to proceed with this action. Both plaintiffs allege that the regulations, which are aimed directly at them, restrict their rights to treat medical matters relating to abortions. This allegation can be fairly read to charge that the Abortion Regulations deprive Dr. Howard of his asserted right to offer abortions without substantial restrictions during the first trimester. In the instant case the defendants, pursuant to the Abortion Regulations, have the power to deny authorization to

[6] Section 9-5 of the Chicago Municipal Code states:

> The president of the board of health, the assistant to the president of the board of health, the secretary of the board of health, the commissioner of health, and all physicians, employes or inspectors who may be designated by the board of health shall have full police powers and shall have the right to arrest or cause to be arrested any person who violates any of the health provisions of this code.

those seeking to operate an abortion facility[7] as well as the power to order the closing of any facility that it deems not in compliance with its regulations.[8] Surely, those subject to such deprivations through the use of governmental power have a sufficient interest to maintain this type of action. *See Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970); *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

In addition the defendants, pursuant to the Municipal Code of Chicago, have full police powers and the power to arrest. *See* note 6 *supra*. Whether proceedings brought under this section are characterized as quasi-criminal, as the defendants asserted at oral argument, or criminal in nature, it is clear that they involve a deprivation of liberty. The plaintiffs in their action are

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[7] Abortion Regulations, *supra*, section II provides:
Registration, Requirements and Standards:
(a) No person shall maintain or operate or present himself as maintaining or operating an Abortion Service unless he has first registered such service with the Chicago Board of Health. Registration shall be made on forms furnished by the Chicago Board of Health and shall contain the information required therein. The Board of Health has the right of refusal to register any service that does not comply with the regulations of the Abortion Service. Any change in ownership, physician in charge, staff physicians, staff qualifications, extent of operations, location or affiliate hospital shall be reported to the Chicago Board of Health.

[8] Abortion Regulations, *supra*, section XIX provides:
Closing Abortion Service:
Whenever an inspection determines that an Abortion Service has failed to register in accordance with Section II (a) of these regulations or continued operation of such an Abortion Service would be found to be in violation of any of the sections of the Abortion Service regulations, the Board of Health may direct the Commissioner of Health to order the discontinuance of operations until the Abortion Service is registered or until the Board of Health is satisfied that the violations are corrected, such order shall be served in writing personally, upon the owner or person in charge.

the ones subject to this deprivation and accordingly have a requisite interest in attacking the validity of the challenged regulations.

The defendant takes the position that the Supreme Court's decision in *Poe v. Ullman*, 367 U.S. 497 (1961), precludes the granting of standing to an individual who is merely threatened with prosecution, and that this is especially so where as in the instant case the defendants have in fact complied with the challenged regulations and have received approval to operate their clinic from the Chicago Board of Health. We cannot agree that the threat of prosecution is so insufficient to deprive plaintiffs standing. While it is true that for the immediate present the plaintiffs are safe from any sort of prosecution because of their compliance with the Abortion Regulations, these regulations have a continuing effect. It is precisely this continuing restrictive effect placed on the plaintiffs by the regulations which is the basis of their complaint. In this case, unlike *Poe*, we are dealing with recently enacted ordinances that have potentially very real criminal sanctions.[9] *Doe v. Bolton*, 410 U.S. 179 (1973), makes it very clear that physicians faced with criminal liability for the performance of an illegal abortion do have a sufficient interest to challenge the validity of the state's law.

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[9] As the Court said in *Doe v. Bolton*, 410 U.S. 179 (1973):

> [In *Poe v. Ullman*, 367 U.S. 497 (1961)] a sharply divided Court dismissed an appeal from a state court on the ground that it presented no real controversy justifying the adjudication of a constitutional issue. But the challenged Connecticut statute, deemed to prohibit the giving of medical advice on the use of contraceptives, had been enacted in 1879, and, apparently with a single exception, no one had ever been prosecuted under it. Georgia's statute, in contrast, is recent and not moribund. Furthermore, it is the successor to another Georgia abortion statute under which, we are told, physicians were prosecuted. The present case, therefore, is closer to *Epperson v. Arkansas*, 393 U.S. 97 (1968), where the Court recognized the right of a school teacher, though not yet charged criminally, to challenge her State's anti-evolution statute.

410 U.S. at 188-89.

> We conclude, however, that the *physician-appellants*, who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do *have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution*, for violation of the State's abortion statutes. The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. *They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.*

410 U.S. at 188 (emphasis added).

Defendants contend, however, that despite the plaintiffs' interest in challenging the regulation, they cannot assert as one of the grounds of invalidity that the regulations violate a woman's right of privacy in deciding whether to abort a pregnancy. The district court relying on *Tileston v. Ullman*, 318 U.S. 44 (1943) agreed with this contention. In *Tileston* the Supreme Court held that a physician was without standing to assert the rights of his patients in an action to declare a state anti-birth control statute unconstitutional. The Court said:

> The sole constitutional attack upon the statutes under the Fourteenth Amendment is confined to their deprivation of life—obviously not appellant's but his patients. There is no allegation or proof that appellant's life is in danger. His patients are not parties to this proceeding and there is no basis on which we can say that he has standing to secure an adjudication of his patients' constitutional right to life, which they do not assert in their own behalf.

318 U.S. at 46.

The Supreme Court has on a number of occasions distinguished its *Tileston* holding. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), a physician was found to have

standing to assert the constitutional rights of married individuals with respect to the state statute forbidding the use of contraceptives. Similarly, in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Court found that a physician had the requisite standing to assert the rights of unmarried persons denied access to contraceptives. Admittedly, both *Griswold* and *Eisenstadt* rely in part on the fact that actual criminal convictions were involved. This fact, however, does not remove the present case from their mold. Although this case does not involve a present criminal prosecution, in our view the fact that the challenged regulations are aimed and operate directly on the plaintiffs, and are of a continuing nature, with potentially very real criminal consequences is sufficient to allow plaintiffs to assert the rights of their patients. *Doe v. Scott*, 321 F. Supp. 1385, 1387-88 (N.D. Ill. 1971) (three-judge court) *vacated on other grounds*, 410 U.S. 950 (1973); *Crossen v. Breckenridge*, 446 F.2d 833, 839-40 (6th Cir. 1971).

Griswold and *Eisenstadt* are based in part on the type of relationship that existed between the plaintiff and the individual whose rights he is seeking to assert. In the abortion context the Supreme Court has recognized the need for patients to consult with their attending physician. *Roe v. Wade*, 410 U.S. at 163. As such, the attending physician is integrally involved in the abortion decision itself. This is not, therefore, a case where one party seeks to raise the rights of another with whom he has only marginal involvement. Rather as the Court recognized in *Griswold* the rights being asserted were "likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to [the one whose rights are raised]. . . ." 381 U.S. at 481.[10] The assertion by a third party of another's rights in appropriate cir-

[10] Similarly, the Court in *Eisenstadt v. Baird*, 405 U.S. 438 (1972) said:

> And so here the relationship between Baird and those whose rights he seeks to assert is not simply that between a distributor and potential distributees, but that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so.

405 U.S. at 445.

cumstances is not a new principle. In *Barrows v. Jackson*, 346 U.S. 249 (1953), the Supreme Court allowed a seller of land to defend an action for damages for breach of a racially restrictive covenant on the grounds that the covenant violated the equal protection rights of prospective non-Caucasian purchasers. The Court said:

> Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained.

346 U.S. at 257. *See also Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Traux v. Raich*, 239 U.S. 33 (1915).

It is not at all inconceivable that women who seek abortions will be dissuaded from challenging restrictions on their right to one during the first trimester, and will instead enter facilities that comply with the Board of Health's regulations. This would then leave unchallenged, except for the efforts of these plaintiffs, the allegedly impermissible restrictions on a pregnant woman's right of privacy.

Finally, there is another reason why we believe that plaintiffs should be permitted to assert the rights of pregnant women. To the extent that a woman's right to an abortion during the first trimester is a fundamental one, it would be a wholly undesirable situation for physicians to be placed in the position of guessing at the risk of criminal liability whether they could honor and give effect to that right.

For all of the foregoing reasons we believe the district court erred when it ruled that the plaintiffs could not attack the validity of the Abortion Regulations on the basis of right of privacy as espoused by the *Roe* decision.

III

Having decided that the plaintiffs do have standing to claim the Abortion Regulations unduly infringe upon the privacy of their patients, it is next necessary to con-

sider whether the regulations can stand in light of the Supreme Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973).

In *Roe* the Court struck down as unconstitutional a Texas statute which made it a crime to procure or attempt an abortion except for the purpose of saving the life of the mother. The Court based its holding on a woman's fundamental right of privacy. It stated:

> *This right of privacy*, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, *is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.*

410 U.S. at 153 (emphasis added).

The Court went on to say, however:

> [T]hat the right, nonetheless, is not absolute and is subject to some limitations, and that at some point the state interests as to protection of health, medical standards, and pre-natal life, become dominant.

410 U.S. at 155.[11]

The Court in the course of its opinion made it very clear that prior to the end of the first trimester governmental concern with respect to maternal health could not be sufficient to overcome a woman's right to decide to abort a pregnancy.

> With respect to the State's important and legitimate interest in the health of the mother, *the "compelling" point*, in the light of present medical knowledge, *is at approximately the end of the first*

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[11] In the same regard the Court said:
> As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

410 U.S. at 159.

trimester. . . . It follows that, *from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.* Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

This means, on the other hand, that, *for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.*

410 U.S. at 163 (emphasis added).

The regulations that we have previously summarized are quite extensive and are applicable to any place or facility in which abortions are performed[12] without regard to the trimester involved. For the following reasons our reading of the foregoing language compels us to conclude that the Abortion Regulations adopted by the Chicago Board of Health cannot stand.

The defendants contend that notwithstanding the above language, that since their regulations are reasonably related to legitimate state interests—protecting the health and safety of the mother—that

[12] Defendants at oral argument contended that the regulations would not be applicable to an individual practitioner's office. We disagree with their assertion. Section I(a) defines an "Abortion Service" as "a place or facility in which abortions are performed," and section II(c) states:

> An abortion shall be performed only by a physician . . . in an Abortion Service operated in accordance with the provisions of these regulations.

Abortion Regulations, *supra*, section II(c).

they therefore do not run afoul of any constitutional prohibition. They concede that the Supreme Court found that the abortion procedure, at least during the first trimester, was no more dangerous than normal childbirth. *Roe, supra*, at 149. They argue, however, that the Supreme Court used this fact to hold only that it was state laws prohibiting all, or the great majority of abortions that could no longer be justified by maternal health considerations. Thus, they conclude that the Supreme Court in *Roe* and *Doe* passed no judgment on the question of whether there was a sufficient governmental interest during the first trimester to place reasonable health and safety requirements on the abortion procedure. We do not view the Supreme Court's language as narrowly.

It is true that a state and under appropriate authorization, local governmental units have broad powers to establish and enforce standards for the purpose of protecting the health of its citizens. *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954). Under traditional analysis, exercise of the police power need only bear some rational relationship to a legitimate governmental interest. *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 488-91 (1955). It is quite conceivable that under this standard the Abortion Regulations would be upheld, although on the record before this court there is no basis for determining whether the regulations are even reasonably related to a valid state concern.

The Supreme Court, however, has determined that where fundamental rights are involved, regulations limiting these rights may be sustained only by a "compelling state interest." *Kramer v. Union Free School District*, 395 U.S. 621, 627-28 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). Despite the laudable goals of the Chicago Board of Health in attempting to set comprehensive safety standards for all abortion procedures, *Roe* will not allow these regulations to stand. The Court's language makes abundantly clear that it is not until "from and after" the first trimester that a state may regulate abortions by regulations "reasonably relate[d] to the preservation and protection of maternal health." *Roe, supra*, at 163.

If there was any doubt as to whether the Supreme Court was declaring broad health and safety regulations for first trimester abortions impermissible, it was cleared up by the Court's description of what became permissible *after* that period. It was only after the "compelling point" that the Court said permissible state regulations could include requirements as to the specialty qualifications of the person who is to perform the abortion,[13] the type of facility where it might be performed and similar types of regulations. *Roe, supra*, at 163. That the Court was referring to health and safety type regulations, is supported by another section of its opinion.

> The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal "abortion mills" strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus, *the State retains a definite interest in protect-*

[13] The precise language of the Court is "requirements as to the qualifications of the person who is to perform the abortion." *Roe, supra* at 163. While it might be possible to interpret this language to mean that the state cannot require that a physician perform an abortion during the first trimester, we believe the better view of this language is to the effect that after the first trimester the state may require that a physician with a specialty is required to perform all abortions. This view is supported by the fact that throughout the opinion the Court considers the physician as playing an integral role in any abortion decision. Furthermore the Court went on to say, without reference to the trimester involved that "[t]he state . . . may proscribe any abortion by a person who is not a physician. . . ." *Roe, supra* at 165.

> *ing the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.*

410 U.S. at 150 (emphasis added).

In *Doe v. Bolton*, 410 U.S. 179 (1973), the Court decided that the Georgia statute requiring that abortions be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals (JCAH) could not withstand constitutional scrutiny. After holding that the JCAH accreditation requirement was not reasonably related to the purposes of the Act in which it was found the Court stated:

> This is not to say that Georgia may not or should not, *from and after the end of the first trimester*, adopt standards for licensing all facilities where abortions may be performed so long as those standards are legitimately related to the objective the State seeks to accomplish.

410 U.S. at 194-95 (emphasis added).[14]

We are not the first court to conclude that the fundamental right of privacy as described in *Roe* and *Doe* is expansive enough to include within its purview governmental regulations that seek to regulate abortion facilities during the first trimester. In *Word v. Poelker*, No. 73-1739 (8th Cir. Feb. 20, 1974), the Eighth Circuit in striking down a St. Louis ordinance similar to the one involved here said:

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[14] There is at least one part of the *Doe* opinion that might be read as allowing limited health regulations on facilities offering abortions during the first trimester. The Court said:

> We feel compelled to agree with appellants that the State must show more than it has in order to prove that only the full resources of a licensed hospital rather than those of some other *appropriately licensed* institution, satisfy these health interests. We hold that the hospital requirement of the Georgia law, because it fails to exclude the first trimester of pregnancy . . . is also invalid.

410 U.S. at 195 (emphasis added).

We find however, that the language at best only implies that health regulations may be imposed on abortion facilities and that this implication flies in the face of the more direct and controlling language that we have set out in our opinion.

> The city ordinance in question here reflects no recognition of the fundamental rights involved and the commensurate restrictions on state action.
>
> * * *
>
> We hold that St. Louis city ordinance No. 56579 is, by reason of its failure to exclude the first trimester of pregnancy, an invalid and overbroad enactment infringing unreasonably upon fundamental rights.

Id. at 4. *See also Coe v. Gerstein*, No. 72-1842-Civ-JE (S.D. Fla. Aug. 13, 1973).

The appellees seek to escape the mandate of *Roe* and *Doe* by contending that they were premised on state interference with a woman's right of privacy, at least in the first trimester, to *decide* to abort a pregnancy, and that the challenged regulations in the instant case do not affect the "abortion decision." We disagree. The regulations by their very nature restrict the abortion decision and affect whether and in what manner an abortion will take place. The decision whether or not to abort a pregnancy cannot be made in a vacuum without regard to who will perform the operation, where and under what conditions it will be performed, and what procedure will be followed. All these are involved in any abortion decision and it is precisely these elements of the decision that the regulations challenged here seek to control. The language in *Roe* and *Doe* makes very clear that even after the decision to abort a pregnancy is made that decision must be able to be "effectuated by an abortion free of interference by the State." *Roe, supra* at 163.

Roe and *Doe* compel us to conclude that the fundamental right of privacy includes, at least during the first trimester of pregnancy, the right to be free from governmental regulations that have an effect on the

abortion decision.[15] One look at the challenged regulations, summarized previously, show that they regulate during the first trimester precisely the type of things that the Supreme Court has said cannot be regulated until after that "compelling point."

There is another reason as well why the Chicago Board of Health's regulations cannot stand. The district court in its opinion stated that:

> [P]hysicians performing abortions are selected from their profession to be subject to special regulations: but such discrimination is not unlawful when, as in this case, it is not arbitrary, unreasonable or unrelated to the governmental interests involved.

367 F. Supp. at 603.

We disagree with this reasoning of the district court.

It is clear that:

> The Equal Protection Clause . . . does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A

[15] The Supreme Court's conclusion that regulations during the first trimester must be essentially limited to requiring a licensed physician has not escaped criticism.

> The fact that childbirth causes more women to die than do first-trimester abortions obviously does not warrant the Court's conclusion that state controls over first-trimester abortion procedures must be limited to requiring a licensed physician, or indeed that such controls must be limited to whatever state regulations exist governing medical practice generally. For it is conceivable that even very early abortions would in some particular category of cases pose substantial and distinctive risks to maternal life or health unless specified procedures were complied with. So long as procedural requirements defended in terms of health are not used as a subterfuge to forbid early abortions on other grounds, the argument for their imposition by law seems compelling enough to justify their promulgation and enforcement.

Tribe, *The Supreme Court 1972 Term — Foreword: Toward a Model of Roles In Due Process of Life and Law*, 87 HARV. L. REV. 1, 30 (1973).

classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

Reed v. Reed, 404 U.S. 71, 75-76 (1971).

Roe established that the decision to abort a pregnancy during the first trimester was within a woman's right of privacy, which right has been held to be fundamental. *Roe, supra* at 155; *accord, Stanley v. Georgia*, 394 U.S. 557, 564 (1969). Where fundamental rights are involved, it is impermissible to treat differently two classes which do not differ on any ground related to the purpose of the challenged statute. *Doe v. Bolton*, 410 U.S. 179, 194 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Given the Supreme Court's acceptance of the medical fact that the mortality rate of women receiving legal abortions is "as low as or lower than the rates for normal childbirth," *Roe, supra* at 149, there would seem to be little justification for more extensive governmental regulations, purportedly based on health considerations, for one procedure than the other. *Doe v. Hale Hospital*, 500 F.2d 144 (1st Cir. 1974).

The Chicago Board of Health Rules on Abortion Services regulates comprehensively physicians who perform abortions, while at the same time leaving other medical procedures, often much more complex and dangerous in terms of the patient's health, up to the good judgment of the physician. The challenged regulations describe what equipment and supplies must be available, what medical tests must be performed, a minimal time interval between initial examination and termination of the pregnancy and what post-operative care shall be rendered.

The Chicago Municipal Code section on dispensaries[16] does not regulate other medical procedures as extensively; instead it leaves these matters to the discretion of the physician. The Board of Health has offered no sufficiently compelling reason to justify this difference in treatment. Similar reasoning was employed by the Supreme Court when it struck down the Georgia provision requiring two-doctor concurrence before an abortion could be authorized. The Court said:

> [N]o other voluntary medical or surgical procedure for which Georgia requires confirmation by two other physicians has been cited to us. If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure and deprivation of his license are available remedies.

Doe v. Bolton, 410 U.S. 179, 199 (1973).

Recently, the Eighth Circuit when dealing with regulations that were similar to the one's challenged here said:

> We think that this myriad of requirements is unduly restrictive of a physicians's right to administer his judgment as to an operation that is now established to be, within the first trimester of

[16] We use the local ordinances on dispensaries for comparison purposes as opposed to the ordinance on hospitals (MUNICIPAL CODE OF CHICAGO, ch. 137) because the Supreme Court has clearly decided that any state regulation requiring hospitalization for the performance of an abortion during the first trimester is impermissible. *Doe v. Bolton*, 410 U.S. at 195.

From the definition of dispensaries, it seems clear that the requirements of the ordinance would be applicable to abortion clinics. MUNICIPAL CODE OF CHICAGO, ch. 118, § 1.1. It should be noted, however, that the dispensary provisions do not purport to cover a doctor's office. *Id.* § 1.2.

The only restrictive requirements placed on dispensaries are: a requirement that complete medical records be kept, *Id.* § 6; the reporting of all contagious, epidemic, or communicable diseases; *Id.* § 7; and a general requirement that: "Every person conducting or operating a dispensary shall keep the rooms, equipment, and apparatus of such dispensary in a clean and sanitary condition." *Id.* § 8.

> pregnancy, safer than childbirth. We are referred to no other single surgical procedure where doctors are required to "prove up" their overall fitness as they are here.

Word v. Poelker, supra at 6.[17]

Thus, because the defendant treats differently without a compelling reason medical procedures which in terms of health risks are not distinguishable and because this difference in treatment affects adversely fundamental rights, the challenged regulations cannot be allowed to remain in effect.

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[17] Similarly, a three-judge district court said:

> Plaintiffs assail the regulation [requiring hospital affiliation] on several grounds. Their leading argument is that *Roe* and *Doe* exempted first-trimester abortion facilities from any licensing requirements that do not apply to medical facilities generally. We agree. [Citations omitted.] Under *Roe* and *Doe*, if North Carolina may regulate the performance of first-trimester abortions at all, it may do so only to the extent that it regulates tonsillectomies and other relatively minor operations. . . . Doctors may perform other medical procedures—including minor surgery and obstetrical delivery, which is considered more dangerous than first-trimester abortion—[footnote omitted] away from hospitals, with neither a transfer agreement nor active staff privileges. [Citation omitted.] That the state is ordinarily willing to leave such matters to the professional judgment of the attending physician strongly suggests that the program for regulating abortion clinics is a thinly disguised effort to evade *Roe* and *Doe*.

Hallmark Clinic v. Department of Human Resources, Civ. No. 74-27-Civ. 5 (E.D. N. Cal. Aug. 30, 1974).

IV

We have determined that given the fundamental right status of a woman to terminate her pregnancy during the first trimester, that in no circumstances could we allow to stand regulations, purporting to promote maternal health, that are more expansive than regulations that are applied to other medical procedures of the same risk and complexity. There is nothing to indicate in this case, that the Chicago Board of Health seeks to regulate any other medical procedure except in the most general of terms.[18] Furthermore, any proposed regulation, even if applied universally to all similar medical procedures, because of the fundamental right of a woman to procure an abortion during the first trimester, would have to meet a compelling governmental interest requirement. Thus, any general health regulations which would apply to first trimester abortions would have to be limited so as to give effect to the fundamental rights as established by *Roe* and *Doe*; that is not be burdensome on a woman's right to decide to abort a pregnancy. By this we mean that in all probability nothing broader than general requirements as to the maintaining of sanitary facilities and general requirements as to meeting minimal building code standards would be permissible.

We do not, however, completely rule out the possibility that there exist some inherent aspects of an abortion procedure which make it unique from other medical procedures of substantially the same risk. For such aspects, the Board of Health may be able to show that a narrowly drawn health regulation is compelling. Again we should point out that the state will bear a heavy burden in justifying any such regulation, both with respect to showing the existence of a unique medical complication and with respect to showing that the problem is of such a nature as to be beyond the general scope of a doctor's professional judgment.

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[18] *See* note 16, *supra*.

Because it is clear that the challenged regulations here, even if interpreted in a limited manner, could not meet the standards we have set for the first trimester of pregnancy, we declare them invalid.

We reverse the judgment of the district court and remand with directions to enter an order consistent with this opinion granting plaintiffs' requested relief.[19]

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[19] From and after the first trimester according to the Supreme Court in *Roe*, the state has a legitimate interest in maternal health and "may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." 410 U.S. at 163. Even if the challenged regulations here were interpreted as applying only to the period after the first trimester, there is no basis in the record upon which this court could make a determination as to which of these regulations were reasonably related to a valid state interest.

While under a rational relationship type test a municipal ordinance pursuant to its police powers will be given great deference, *Dandridge v. Williams*, 397 U.S. 471, 487 (1970); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961), it must be remembered that at the end of the first trimester a woman does not lose completely her right of privacy. See note 11, *supra*. The Supreme Court held in *Roe* that at that point a legitimate state interest in the health of the mother accrues. Thus, any regulation dealing with maternal health after the end of the first trimester must not only be reasonably related to a valid health purpose, but must have appropriate regard to the still existing right of privacy of the mother. Exactly where this balance is to be struck will have to be decided on a case by case basis.

FAIRCHILD, *Circuit Judge*, concurring. I agree that plaintiffs have standing to challenge the Board of Health regulations as infringing upon their patients' right to privacy. I agree that language in *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973) must mean that regulations of the type here involved, exclusively applicable to abortion procedures and applicable whether or not an abortion is within the first trimester, violate the right to privacy. I respectfully disagree, however, with two propositions set forth in Part IV of this court's opinion.

First, the majority indicates, apparently as dictum, that any general regulation of a broad class of medical and surgical procedures within which abortion would fall must satisfy a "compelling governmental interest requirement" before it can be applied to abortions during the first trimester and therefore would probably be limited to general sanitary and structural codes. I do not believe that *Roe* requires such a result. While recognizing that abortion during the first trimester is as safe as normal childbirth and that special State interest in protecting the patient from an inherently dangerous surgical procedure has thus largely disappeared during this period, the Supreme Court noted that:

> "Of course, important state interests in the area of health and medical standards do remain. The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise." *Roe v. Wade, supra*, at 149-150.

This language indicates, I believe, that special regulation aimed expressly or in fact at abortions, including those conducted during the first trimester, such as in the present case, impermissibly limits the patient's constitutional right to privacy by imposing a burdensome, extra layer of requirements upon a surgical process

deemed indistinguishable from similar medical procedures. Nevertheless, regulation of the safety of all these procedures, incidentally including first trimester abortions, through imposition of generally applicable regulations, would seem to be a valid exercise of the State's interest in protecting health and need only satisfy the traditional tests of judicial scrutiny imposed in this area. *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954).[1]

Second, while I agree that it is inappropriate to save the regulations under consideration here by construing them as excluding abortions performed during the first trimester, I do so because of the difficulty and confusion which would probably result from such exception by construction. The majority, however, in rejecting the saving-by-construction course asserts that there is no basis in the record for a determination as to which of the regulations, even if so limited, are reasonably related to a valid State interest. This places the burden of establishing the constitutionality of challenged regulations on the State. In the case, however, of regulations of the period after the first trimester, when the State has a "compelling interest" in regulation of the abortion procedure, *Roe v. Wade, supra*, at 163, such regulations are, in my opinion, entitled to presumptive validity, and the burden of establishing lack of reasonable relationship to permissible objectives should be left with the charging party. Compare, *Morales v. Schmidt*, 494 F.2d 85, 88 (7th Cir., 1974) (Stevens, J. concurring).

[1] It goes without saying, that any such generally applicable regulation including first trimester abortion procedures within its scope, which fail reasonably to relate to safety concerns presented by this type of medical procedure, would fail.

With the exception of the above issues, I concur in Judge Sprecher's thoughtful opinion.

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APPENDIX B

Friendship Medical Center, Ltd. and T. R. M. Howard,
Plaintiffs,

vs.

The Chicago Board of Health, et al.,
Defendants.

No. 73 C 1965.
N. D. Illinois E. D.
November 16, 1973.

OPINION

AUSTIN, District Judge.

Plaintiffs brought this suit for alleged violations of 42 U.S.C. § 1983,[1] seeking an injunction against enforcement, and a declaration of unconstitutionality, of the 1973 Abortion Services Regulations promulgated by the Chicago Board of Health.[2] The case is presently before this court to resolve the questions raised by defendants' joint motion to dismiss the complaint. The alleged facts are as follows:

Plaintiffs are a medical corporation and a physician who own and operate an abortion clinic in Chicago. They chal-

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[1] 42 U.S.C. § 1983 reads as follows: "Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress."

[2] A three-judge panel has not been assembled in this case because the statute in question is one with only local application—i.e., a municipal regulation. *See* Moody v. Flowers, 387 U.S. 97, 87 S.Ct. 1544, 18 L.Ed.2d 643 (1967); Mitchell Family Planning, Inc., v. City of Royal Oak, 335 F.Supp. 738, 740 (E.D.Mich.1972).

lenge certain aspects of the Regulations for Abortion Services adopted and promulgated by defendants Chicago Board of Health, Oldberg (its president), and its members. Generally, the regulations are safety measures which prescribe the methods and conditions under which abortions may be performed, regardless of the duration of the patient's pregnancy.[3] They also require the filing of a registration form by any facility in which abortions are performed, containing facts indicating compliance with all the rules.[4] If an abortion clinic fails to register or otherwise comply with the regulations, the Board of Health may order the discontinuance of operation until the clinic is registered or the violations corrected.

Plaintiffs claim the abortion regulations violate the United States Constitution in that: (a) they unduly restrict the rights of abortion patients to personal and marital privacy as established by the First, Fourth, Fifth, Ninth and Fourteenth Amendments; (b) they deny equal protection of the laws; (c) they violate the procedural and substantive due process guarantees of the Fifth and Fourteenth Amendments; and (d) they are overbroad and vague in violation of the due process clauses of the Fifth and Fourteenth Amendments.

Plaintiffs further claim that the regulations violate the Illinois Constitution in that: (a) they violate the right to privacy set forth in Article 1, Section 6; (b) they violate the due process and equal protection clauses of Article 1, Section 2; and (c) they violate the right to remedy and justice under Article 1, Section 12.

Lastly, plaintiffs claim the regulations unlawfully infringe upon their right to engage in the diagnosis and treatment of human ailments, by restricting their right to diagnose the "disease" of pregnancy and to properly treat it by aborting it, in that (a) they require the registration

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[3] The regulations are reproduced in Appendix A to this opinion. [Appendix C to this Petition.]

[4] The registration form is reproduced in Appendix B to this opinion. [Appendix D to this Petition.]

of abortion clinics with the Board of Health; (b) they require that the performance of abortions be only in clinics registered with the Board of Health; (c) they require that an abortion clinic have an ambulance service to transport an abortion patient in an emergency to a hospital within a total transport time of 15 minutes, and that it have a written affiliation agreement with the hospital so the latter will accept abortion patients in need of follow-up emergency care; (d) they require a period of 24 hours between the initial examination and the termination of pregnancy; (e) they require a pathological examination of all tissue removed from the uterus of an abortion patient, and (f) they impose other improper conditions which plaintiffs fail to specify. Plaintiffs assert these conditions are unrelated to the reasonable and vital needs and interests involved; that they are unrelated to the extent to which the subject pregnancy may be in the first trimester thereof; and that they are therefore unconstitutional.

The precise questions presented here are: (a) whether this court has subject-matter jurisdiction of this suit; (b) whether plaintiffs have standing to litigate all the constitutional issues presented in their complaint; (c) whether this case is moot; and (d) whether the complaint states a claim upon which relief may be granted under 42 U.S.C. § 1983, in light of the recent decisions of the Supreme Court in *Roe* v. *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and *Doe* v. *Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973).

JURISDICTION

Subject-matter jurisdiction of the instant suit is alleged to rest upon 28 U.S.C. § 1331,[5] which confers upon this court the power to adjudicate federal constitutional ques-

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[5] 28 U.S.C. § 1331 provides in pertinent part: (a) The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

tions in which the amount in controversy exceeds $10,000, exclusive of interest and costs. In support of their allegation of jurisdiction, plaintiffs claim the amount in controversy exceeds the $10,000 figure.

Defendants move to dismiss, asserting that mere allegation that the amount in controversy exceeds $10,000 does not by itself give a court jurisdiction under § 1331. Rather, further allegations of fact from which the amount can be inferred must be made. They argue that since plaintiffs do not make such additional allegations, the jurisdictional amount cannot be considered to exist. Therefore, they conclude this court lacks jurisdiction.

The object of this suit is to enjoin the enforcement of, and to declare unconstitutional, a municipal regulation. It is becoming increasingly recognized in cases where such relief is sought, that the amount in controversy is the value of the benefit which will be conferred upon the plaintiff if he prevails. *See* C. Wright, Law of Federal Courts § 34 at 117 (2d ed. 1970). Stated another way, the amount in controversy in a suit to enjoin a regulatory law is the cost to the plaintiff if he is forced to obey that law. *See McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1934).

The abortion regulations in the present case require plaintiffs to maintain certain conditions and equipment at their clinic, and to hire certain personnel. Plaintiffs allege neither what the cost of compliance with the regulations will be nor that they will not incur the expenses unless so required.[6] Thus, the amount in controversy in the instant suit is far from certain. However, such certainty is not required, absent evidence contrary to the plaintiffs' jurisdictional allegations, to prevent dismissal. The rule governing dismissal for want of jurisdiction is that the sum claimed by the plaintiff to be in issue controls if apparently made in good faith. "It must appear to a *legal certainty*

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[6] If plaintiffs will make these expenditures regardless of the regulations, it can hardly be said that there is *any* amount of money in controversy.

that the claim is really for less than the jurisdictional amount to justify dismissal." *St. Paul Mercury Indemnity Co.* v. *Red Cab Company,* 303 U.S. 283, 289, 58 S.Ct. 586, 82 L.Ed. 845 (1937) (emphasis added). There being no evidence that plaintiffs' jurisdictional allegations were made in bad faith, and there being an insufficient basis upon which to conclude to a legal certainty that, as a result of the abortion regulations, plaintiffs' expenses will be increased by less than $10,000, defendants' motion to dismiss for lack of subject-matter jurisdiction must be denied.

STANDING

In support of their motion to dismiss, defendants argue that plaintiffs lack standing to question the constitutionality of the abortion regulations. For the following reasons, their argument must be rejected in part; and therefore the motion to dismiss is granted only in part.

A. *The Issue of Privacy*

The question presented here is whether a private physician has standing to seek injunctive and declaratory relief against municipal health regulations, because they allegedly violate his patients' rights to personal and marital privacy. In other words, may a physician bring an action on behalf of his patients to protect *their own* fundamental constitutional rights, if they themselves are able to assert and protect their rights in the courts without his aid? Although one distinguished Court in this District has held in the affirmative on this issue, *see Doe* v. *Scott,* 321 F. Supp. 1385, 1387-1388 (N.D.Ill. 1971), I cannot agree for the following reasons.

In order to assert a particular issue, it is established beyond all doubt that the plaintiff must have standing to do so. Furthermore, the doctrine of standing has come to require a twofold inquiry: first, whether the dispute at hand represents a "case of controversy" under Article III of the Constitution so it will be presented in an adversary context in a form historically viewed as capable of judicial resolution; and second, whether the litigant has a personal

stake or interest in the outcome of that controversy. *Flast* v. *Cohen,* 392 U.S. 83, 101, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). The first inquiry goes to the jurisdiction of the court to entertain the question presented, and the second is a rule of self-restraint which precludes a person from challenging the constitutionality of state action by invoking the rights of others. *Barrows* v. *Jackson,* 346 U.S. 249, 255, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953). An exception to this second rule is that a party may assert the rights of others where "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court, *Id.* at 257, 73 S.Ct. at 1035.

In the present case, plaintiffs seek to have the abortion regulations declared unconstitutional and to enjoin the Chicago Board of Health from enforcing the regulations on the ground that they unduly restrict the rights to personal and marital privacy. Surely, this is a "case or controversy" within the meaning of Article III. But whose rights are asserted here? Clearly, they are not those of the individual plaintiff. Rather, they are the rights of his patients who are not parties to this suit. Moreover, plaintiff Howard does not purport to claim his own right to privacy is violated. Therefore, plaintiffs are asserting the rights of others in this case; and there is absolutely no reason why the patients cannot seek redress of alleged violations of these rights themselves if they so choose.

As far back as *Tileston* v. *Ullman,* 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603 (1943), the Supreme Court recognized that a physician may not assert the rights of his patients in an action to declare a state anti-birth control statute unconstitutional as applied to him, saying:

> "The sole constitutional attack upon the statutes under the Fourteenth Amendment is confined to their deprivation of life—obviously not appellant's but his patients. There is no allegation or proof that appellant's life is in danger. His patients are not parties to this proceeding and there is no basis on which we can say that he has standing to secure an adjudication of his patients' constitutional right to life, which they do not assert in their own behalf." *Id.* at 46, 63 S.Ct. at 494.

To be sure, the Court has distinguished its holding in *Tileston* on several occasions. For example, in *Griswold* v. *Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), Mr. Justice Douglas, stating the Opinion of the Court, said:

> "We think that appellants have standing to raise the constitutional rights of the married people with whom they had a professional realtionship. *Tileston* v. *Ullman*, 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603, is different, for there the plaintiff seeking to represent others asked for declaratory judgment. In that situation we thought that the requirements of standing should be strict, lest the standards of "case and controversy" in Article III of the Constitution become blurred. Here those doubts are removed by reason of a *criminal conviction* for serving married couples in violation of an aiding-and-abetting statute. *Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not or cannot constitutionally be a crime.*" *Id.* at 481, 85 S.Ct. at 1679. (emphasis added).

Likewise, in *Eisenstadt* v. *Baird*, 405 U.S. 438, 443-447, 92 S.Ct. 1029, 31 L.Ed. 2d 349 (1972), the Court held that a person convicted of a statute prohibiting (1) distribution of contraceptives to married couples for the purpose of preventing pregnancy, and (2) distribution of contraceptives to single persons for any purpose, had standing to assert the denial of equal protection of the laws to single persons. Again, the Court in *Eisenstadt* was quick to point out the fact that *Tileston* v. *Ullman* does not deny standing to assert the rights of others where the person making such assertions has been convicted of a crime created by an unconstitutional statute, saying:

> "This factor decisively distinguishes *Tileston* v. *Ullman*, 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603 (1943), where the Court held that a physician lacked standing to bring an action for declaratory relief to challenge, on behalf of his patients, the Connecticut law prohibiting the use of contraceptives. The patients were fully

able to bring their own action. . . ." *Id.* at 443, n. 4, 92 S.Ct. at 1033.

Cf. *Roe* v. *Wade,* 410 U.S. 113, 123-127, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and *Doe* v. *Bolton,* 410 U.S. 179, 186-189, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973); (doctor has standing to sue on his own behalf and on behalf of others similarly situated for alleged violations of his own constitutional rights).

It is concluded, therefore, that plaintiffs lack standing to assert the abortion regulations of the Chicago Board of Health violate the right to privacy. Accordingly, those portions of the complaint containing such assertions are dismissed.

B. *The Remaining Issues*

Plaintiffs also claim the abortion regulations: (a) deny them the equal protection of the laws; (b) violate the procedural and substantive due process guarantees of the Fifth and Fourteenth Amendments; (c) violate the due process clauses of the Fifth and Fourteenth Amendments in that they are overbroad and vague; (d) violate the right to remedy and justice of Article 1, Section 12 of the Illinois Constitution and (e) infringe upon their rights to engage in the diagnosis and treatment of human ailments by restricting their rights to diagnose and treat medical matters relating to abortions.

It is apparent from these allegations that plaintiffs present a "case or controversy" concerning the constitutionality of the abortion regulations. It is further apparent that the rights allegedly violated are those of the plaintiffs. They therefore have standing to litigate the above issues; and defendants' motion to dismiss for lack of standing must be denied.

MOOTNESS

In further support of their motion to dismiss, defendants submit a registration form filled out by plaintiffs in compliance with the abortion regulations and a letter from the

Board of Health stating that plaintiffs' service meets the minimum standards of the regulations. They argue that as a result of such approval, plaintiffs' case is now moot. This argument must be rejected, however, in view of the fact that the regulations have a continuing regulatory effect on the plaintiffs. Accordingly, this case is not moot; and defendants' motion to dismiss on grounds of mootness is denied.

THE MERITS

The substantive question presented here is whether a municipal board of health may constitutionally prescribe the conditions and environment in a clinic where abortions are performed, and prescribe the facilities to be provided therein. Both parties argue the merits of this issue under *Roe* v. *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and *Doe* v. *Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973). In both cases, the Supreme Court held, in substance, that a woman's decision to continue or terminate her pregnancy is a fundamental right of marital privacy, protected by the Fourteenth Amendment, and the doctrine of substantive due process; and therefore, infringement of that right by the state is lawful only if it has a "compelling interest" to do so.

Defendants, of course, assert that the abortion regulations are health measures which affect only the *safety* of a woman *after* she has decided to terminate her pregnancy. They argue that her decision to abort is unfettered by these health regulations, and that therefore, they are not prohibited by *Wade* and *Bolton*. Plaintiffs, on the other hand, point to the language in *Roe* v. *Wade*, *supra*,[7] and

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[7] In Roe v. Wade, 410 U.S. 113, 163, 93 S.Ct. 705, 732, 35 L. Ed.2d 147 (1973), the court said: "With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester . . . . It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Exam-

argue vociferously that *any* restriction on a physician's decision to terminate a pregnancy in its first trimester constitutes an unlawful infringement of his patient's marital privacy.

I am of the opinion, however, that because plaintiffs do not have standing to claim the abortion regulations unduly infringe upon the privacy of their patients, and because that issue has been dismissed from the case, the principles enunciated in *Roe* v. *Wade, supra,* and *Doe* v. *Bolton, supra,* are inappropriate to the substantive question presented above. Accordingly, other decisions will be looked to in order to resolve this issue.

A. *Federal Constitutional Questions*

Plaintiffs claim the Chicago abortion regulations violate their rights to due process and equal protection, and that the regulations are overbroad and vague, in violation of the Fifth and Fourteenth Amendments.

1. *Substantive Due Process and Equal Protection*

It is beyond dispute that a state has broad power to establish and enforce standards of conduct for the purpose of protecting the health of everyone within its boundaries. It is a vital part of its police power. Moreover, a state's discretion in that field extends naturally to the regulation of all professions concerned with health. *Barsky*

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[7] *Continued*

ples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facilities in which the procedure is to be performed, that is, whether it must be a hospital or maybe a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

"This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State."

v. *Board of Regents*, 347 U.S. 442, 449, 74 S.Ct. 650, 98 L.Ed. 829 (1954); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1954). *See also Eisenstadt* v. *Baird*, 405 U.S. 438, 465-472, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (Burger, C. J., dissenting.) Quite logically, when it has been properly delegated by the state,[8] such power may be exercised on the local level as well. *See Father Basil's Lodge* v. *City of Chicago*, 393 Ill. 246, 252, 65 N.E.2d 805 (1946).

In terms of equal protection and due process, the test of whether a city has properly exercised the police power in the area of health regulation is whether the action in question bears some rational relationship to a legitimate governmental interest.[9] Recent decisions, however, have established an additional test: where "fundamental rights" are involved, regulations limiting them are justified only

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[8] The plaintiffs do not question whether this police power has been properly delegated to the Chicago Board of Health. In addition, it should be noted that the Illinois General Assembly has enacted statutes dealing with abortions. P.A. 78-225, S.H.A. ch. 38, § 81-11, et seq.; P.A. 78-226, S.H.A. ch. 91, § 16a; P.A. 78-227, S.H.A. ch. 111½, § 157-8.1. Each bill became effective on July 19, 1973. Together with the regulations issued pursuant to these laws by the Illinois Department of Public Health, they provide for substantially the same health and safety rules as do the abortion regulations of the Chicago Board of Health. Whether the power "delegated" to Chicago to issue abortion regulations has been preempted by the State is likewise not raised by the plaintiffs. Accordingly, that question is not decided at this time.

[9] Williamson v. Lee Optical Co., 348 U.S. 483, 488-491, 75 S.Ct. 461, 99 L.Ed. 563 (1954); Barsky v. Board of Regents, 347 U.S. 442, 449, 74 S.Ct. 650, 98 L.Ed. 829 (1954); Graves v. Minnesota, 272 U.S. 425, 427-428, 47 S.Ct. 122, 71 L.Ed. 331 (1926); McNaughton v. Johnson, 242 U.S. 344, 348-349, 37 S.Ct. 178, 61 L.Ed. 352 (1916); Watson v. Maryland, 218 U.S. 173, 176-178, 30 S.Ct. 644, 54 L.Ed. 987 (1909); Dent v. West Virginia, 129 U.S. 114, 121-122, 9 S.Ct. 231, 32 L.Ed. 623 (1889); England v. Louisiana State Board of Medical Examiners, 263 F.2d 661, 671 (5th Cir. 1959); England v. Louisiana State Board of Medical Examiners, 246 F.Supp. 993, 996 (E.D.La. 1965), affirmed, 384 U.S. 885, 86 S.Ct. 1924, 16 L.Ed.2d 998 (1966).

if the state (or in this case, the municipality) can demonstrate that such regulations are necessary to promote a "compelling" governmental interest. *E. g., Roe* v. *Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).[10] The essential inquiry under this test is a dual one: Is there a "fundamental" right infringed upon? If so, is such infringement necessary to promote a "compelling" interest? I must confess that, when put through the filter of substantive due process, that test is really no test at all. Rather, it is a vehicle by which precious constitutional rights of the citizenry are thrown up to the fickle winds created by the whims of every life-tenured judge and justice across this nation, in derogation of the informed judgment of the elected legislative representatives of the people. *See Griswold* v. *Connecticut,* 381 U.S. 479, 507-527, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (Black, J., dissenting); *Furman* v. *Georgia,* 408 U.S. 238, 405-414, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Blackmun, J., dissenting).

Be that as it may, I do not believe a physician and his abortion clinic have any "fundamental right" to be free from municipal regulations which exist for the sole purpose of guarding the physical health of his patients. Such is the nature of the abortion regulations in this case. Accordingly, the defendants need not have a "compelling" interest in the instant case to regulate a doctor's practice of medicine. Rather, they need only show there is a rational relationship between the effect of the regulations and a legitimate interest in public health.

Plaintiffs assert in their complaint that defendants' regulations are "unrelated to the reasonable and vital needs and interests involved." Accordingly, they argue that they state a claim upon which relief may be granted. However, I am not convinced.

A close examination of the regulations indicates they are directed toward accomplishing a most legitimate, if not

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[10] For an enlightening discussion of this test in terms of substantive due process and the recent abortion decisions see Comment. In Defense of Liberty: A Look at the Abortion Decisions, 61 Geo.L.J. 1559 (1973).

compelling governmental interest: preserving the health of all abortion patients regardless of the duration of their pregnancy. True, physicians performing abortions are selected from their profession to be subject to special regulations; but such discrimination is not unlawful where, as in this case, it is not arbitrary, unreasonable or unrelated to the governmental interests involved. It is clear, therefore, that the plaintiffs do not state a claim with regard to substantive due process or equal protection of the laws. Accordingly, defendants' motion to dismiss the complaint must be granted as to those two allegations.

2. *Procedural Due Process*

Plaintiffs also contend that the abortion regulations deny them their right to procedural due process. Apparently, their attack is directed toward the administrative procedures for granting and revoking registration, and the type of hearing which must be afforded upon revocation.

In substance,[11] the regulations enable the Chicago Board of Health to close down an abortion clinic which has failed to register or which is violating the health and safety rules

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[11] The pertinent sections of the regulations read as follows:

"XIX. *Closing Abortion Service*:

Whenever an inspection determines that an Abortion Service has failed to register in accordance with Section II(a) of thsee regulations or continued operation of such an Abortion Service would be found to be in violation of any of the sections of the Abortion Service Regulations, the Board of Health may direct the Commissioner of Health to order the discontinuance of operations until the Abortion Service is registered or until the Board of Health is satisfied that the violations are corrected, such order shall be served in writing, personally upon the owner or person in charge.

"XX. *Hearing*:

An Abortion Service served with an order to discontinue operations pursuant to Section XIX above, may request a Hearing before the Board of Health on said order of discontinuance in writing by serving said request on the Commissioner of Health, in person, or by certified mail, return receipt requested. The Board of Health or its designated Officer shall schedule a Hearing within seven (7) days of the receipt of such a request."

contained therein. Written notice of such action must be served upon the owner or person in charge of the clinic. Upon proper registration or correction of the violations, the clinic may resume business. If the clinic wishes to challenge the action of the Board, it may request a hearing; and it will be scheduled within seven days of that request. The regulations fail to specify the format of the hearing.

Plaintiffs' allegation of denial of procedural due process raises two fundamental questions here: (a) Can a municipal board of health summarily order an abortion clinic to stop its operation for violation of local health regulations without granting a hearing prior to such action? (b) If so, what form must the eventual hearing take?

At the outset, it is recognized that the right to follow a chosen profession free from unreasonable governmental interference has long been considered to be "property" under the Constitution. *See, e. g., United States* v. *Robel,* 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); *Greene* v. *McElroy,* 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959). This would include the right to operate an abortion clinic; and it may not be denied without procedural due process of law. What "due process" requires in terms of time and format of an administrative hearing depends largely upon the urgency and weight of the governmental interest as compared to that of the person whose "property" rights are being infringed. *Goldberg* v. *Kelly,* 397 U.S. 254, 262-263, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

Concerning the issue of the timing of the hearing, it is well-recognized that drastic administrative action is often essential to eliminate public health threats which should not be allowed to exist prior to completion of formal proceedings. *See* K. Davis, Administrative Law Treatise § 7.08 at 438. Specifically, when a license is designed to provide control over a licensee for the protection of the public, and when an agency learns that the licensee is seriously endangering the public, the license may be suspended pending hearing on the question of revocation or restoration. *Id.* at 434. *See also Goldberg* v. *Kelly,* 397 U.S. 254, 263, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

There is ample authority upon which to base the conclusion that a local board of health may summarily close down an abortion clinic for violation of safety and health regulations. For example, in *North American Storage Co.* v. *Chicago*, 211 U.S. 306, 29 S.Ct. 101, 53L.Ed. 195 (1908), the Supreme Court considered whether the Chicago Board of Health could seize stored food which had become putrid, and order the closing of the warehouse in which the food was located until it was seized without first granting the owner a hearing. The Court held that such administrative action did not constitute an unlawful taking of property without due process of law, in view of the fact that the public health might be endangered. *Id.* at 315, 29 S.Ct. 101. In *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950), the Court upheld the action of the Food and Drug Administration in seizing, without a hearing, an herbal medicinal preparation which had misleading labels. The Court specifically rejected the contention of the owner of the preparation that procedural due process required a pre-seizure hearing, saying:

> "It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination . . . .
>
> "One of the oldest examples is the summary destruction of property without prior notice or hearing for the protection of public health . . . . A requirement for a hearing, as a matter of constitutional right, does not arise merely because the danger of injury may be more apparent or immediate in the one case than in the other . . . . That is a decision for Congress, not for us . . . . We cannot say that due process requires [a hearing] at that stage." *Id.* at 599-600, 70 S.Ct. at 873.

Furthermore, it has been recognized that in a "wide variety of situations," where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing. *R. A. Holman & Co.* v. *SEC*, 112 U.S.App.D.C. 43, 299 F.2d 127, 131 (1962),

cert. denied, 370 U.S. 911, 82 S.Ct. 1257, 8 L.Ed.2d 404 (1962) (suspension of exemption from stock registration requirement does not mandate a pre-suspension hearing.) *See also, State Board of Examiners* v. *Weiner*, 68 N.J. Super. 468, 172 A.2d 661 (1961). One last example is that a restaurant may be summarily ordered to close down, if, upon inspection, the local board of health discovers that the kitchen and food storage areas are vermin-infested.

Such is the instant case. The Chicago Board of Health has exercised its discretion in the area of safety standards which must be maintained at abortion clinics solely for the purpose of protecting the health of abortion patients. Surely, the health, indeed the lives, of abortion patients is of far greater importance than the right of plaintiffs to operate an abortion clinic free of all governmental interference. Therefore, I cannot believe that an abortion service which utilizes unsafe procedures and unsanitary instruments, and provides inadequate safety equipment should be permitted, as a matter of procedural due process, to continue its operation until the formal hearing process is concluded. Accordingly, it is concluded that plaintiffs' rights to be free of a taking of their "property" without due process of law are not violated by the power of the Chicago Board of Health to revoke their registration prior to a pre-revocation hearing.

The abortion regulations fail to specify the format of a hearing before the Board of Health. In determining the type of proceeding which must be afforded to satisfy the requirement of due process of law, the guiding light is this: the party adversely affected by agency action must be given an opportunity to be heard at a meaningful time and in a meaningful manner—given his education, sophistication and the nature of his rights involved. *See Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

In light of this maxim and in the absence of contrary indications, I am confident that the following elements meet rudimentary due process requirements under the circumstances of the instant case, and that the Board of Health will not substantially deviate from them:

First, an order to terminate operations should not be issued against an abortion clinic unless the Board or its delegate finds there is probable cause to believe its regulations have been violated by that clinic.

Second, written notice of the order to cease operation, which is served upon an abortion clinic or its representative, should contain a detailed statement of all those facts upon which it was preliminarily concluded that the abortion regulations were violated.

Third, the owner or official in charge of the abortion clinic should be permitted to appear at the hearing, either personally or through retained counsel, in order to present his position orally and/or to submit briefs, affidavits and sworn testimony in support of his case.

Fourth, the abortion clinic representative should be permitted to hear all the evidence against him before having to put on his own defense; and he should have an opportunity to confront, and cross-examine those adverse witnesses relied upon by the government.

Fifth, the government should have both the burden of producing evidence and the burden of persuading the decision maker by a preponderance of the evidence that the regulations were violated by the abortion clinic, in order to uphold the inital order to cease its operations.

Sixth, the findings of the decisionmaker should rest solely on the law, the evidence adduced at the hearing and those matters which are officially noticed. Furthermore, he should comply with this requirement by stating in a written opinion the reasons for his determination and indicating the evidence and officially noticed facts he relied upon.

Seventh, the decisionmaker should be completely impartial; that is, he should not be connected in any significant way with the "prosecutorial" branch of the Board of Health.

Eighth, a complete stenographic or mechanically produced record of oral proceedings should be kept so a party may request a transcript thereof for purposes of review.

The foregoing rules are, of course, only for the purpose

of guiding the Board of Health in developing a format for its hearings with regard to abortion clinics. Furthermore, they are not to be considered as limitations on the procedural protections afforded members of the medical profession who perform abortions. Indeed, the Board, City Council or even the State General Assembly may wish to promulgate procedural rules to govern this type of hearing. It is in this light that the foregoing elements of due process are set forth.

Assuming, as I must, that absent indications to the contrary, the Chicago Board of Health will not deny abortion clinics and their owners the right to procedural due process before their "property" is substantially impaired, and because summary agency action to close clinics which are reasonably believed to be in violation of the abortion regulations does not offend due process of law, defendants' motion to dismiss the complaint as to the issue of procedural due process must be granted.

3. *Vagueness and Overbreadth*

Plaintiffs also contend the abortion regulations are vague and overbroad, thus rendering them unconstitutional. Although the questions of vagueness and overbreadth frequently overlap, as in this case, their application is based upon different constitutional principles. Accordingly, they shall be treated separately.

The rule against vagueness involves the issue of whether the provisions of a statute are sufficiently definite to give reasonable notice of prohibited conduct to those who wish to avoid its penalties. A statute will be declared void for vagueness if it is so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability. *E. g., Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 287, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961). *See also Landry* v. *Daley*, 280 F.Supp. 938, 951 (N.D.Ill. 1968).

The regulations in this case represent a twofold effort on the part of the Chicago Board of Health: first, to ensure that abortion patients will not be maimed or killed

in ill-equipped "abortion mills"; and second, to tread as little and as lightly as possible upon a competent physician's exercise of his professional judgment in the treatment of his patients. Applying the rule against vagueness with those two observations in mind, it cannot possibly be said that, upon reading the abortion regulations, a physician with common knowledge of the procedures, equipment, drugs and dangers involved in the performance of abortions would necessarily guess at their meaning. True, they do not specify which drugs must be kept on hand at an abortion clinic, and they do not prescribe the color of the walls in the reception room. But the obvious reason for such omissions is that the Board believed it appropriate to leave certain matters to the discretion of a licensed physician. These regulations, therefore, do not violate the rule against vagueness; and plaintiffs do not state a claim upon which relief may be granted.

The prohibition against overbreadth primarily involves the issue of whether the language of the statute in question, given its normal meaning, is so broad that its sanctions may apply to conduct protected by the Constitution. *Landry* v. *Daley, supra.* The effect of overbreadth in a statute is to needlessly deter citizens from exercising their constitutional rights beyond that point which is necessary to protect the interests of the State.

In the present case, it cannot seriously be contended that the abortion regulations are overbroad. On the contrary, they merely require abortion clinics to provide a clean and safe medical service staffed by competent personnel. Furthermore, in no way do the regulations restrict the actual decision of doctor or patient to terminate a pregnancy. Accordingly, plaintiffs' contention that the regulations are overbroad must also be rejected. Defendants' motion to dismiss the complaint is therefore granted as to the issues of vagueness and overbreadth.

B. *State Constitutional Questions*

Plaintiffs claim the same violations of the Illinois Constitution as they do that of the United States. For the

same reasons that they do not state a federal claim upon which relief may be granted, so also do they fail to present a state claim. *See Smith* v. *Department of Registration,* 412 Ill. 332, 106 N.E.2d 722 (1952); *Lasdon* v. *Hallihan,* 377 Ill. 187, 192-193, 36 N.E.2d 227 (1941); *Father Basil's Lodge* v. *City of Chicago,* 393 Ill. 246, 256-257, 65 N.E.2d 805 (1946); *City of Chicago* v. *Heffron,* 346 Ill.App. 248, 253-255, 104 N.E.2d 846 (1952).

In addition, however, plaintiffs contend that the abortion regulations unlawfully deprive them of their right to remedy and justice under Article I, Section 12 of the Illinois Constitution.[12] However, this claim must be considered in view of the fact that that provision is a statement of philosophy rather than a rule which can be used to solve cases. *See Welch* v. *Davis,* 342 Ill.App. 69, 95 N.E.2d 108 (1950), reversed on other grounds, 410 Ill. 130, 101 N.E.2d 547. Furthermore, it is absolutely clear that their right to remedy and justice is safeguarded by the procedure set forth in the regulations[13] as interpreted above.

It is concluded, therefore, that plaintiffs fail to present a claim upon which relief may be granted under the Illinois Constitution; and thus, defendants' motion to dismiss the complaint must be granted as to those issues.

CONCLUSION

This court holds today that it has subject-matter jurisdiction of the instant case; that plaintiffs do not have standing to question whether the abortion regulations of the Chicago Board of Health violate the right to personal and marital privacy; that this case is not moot; and that the complaint fails to state a claim upon which relief may be granted under 42 U.S.C. § 1983, the United States Constitution, and the Illinois Constitution.

So ordered.

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[12] "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly."

[13] *See* note 11 *supra.*

APPENDIX C

WHEREAS the United States Supreme Court, in its recent decision, made abortions legal under specified conditions; and

WHEREAS it is not the intention of the Chicago Board of Health to determine the legality or appropriateness of abortions; and

WHEREAS the Board of Health of the City of Chicago is charged with the responsibility of protecting the health of all citizens of Chicago; and

WHEREAS numerous cases of injury, and even death, may result from the performance of abortions; and

WHEREAS the Chicago Board of Health has determined that it is necessary to establish appropriate regulations governing registration and operation of Abortion Services; now therefore

BE IT RESOLVED THAT THE CHICAGO BOARD OF HEALTH HEREBY AMENDS THE "HOSPITAL REGULATIONS FOR MATERNITY DIVISION, NEWBORN NURSERY DIVISION," AS ADOPTED AND AMENDED BY ADDING A NEW SECTION X TO SAID REGULATIONS TO BE TITLED "REGULATIONS FOR ABORTION SERVICES, CITY OF CHICAGO."

CHICAGO BOARD OF HEALTH
ABORTION SERVICES

SECTION:

I	Definitions
II	Registration, Requirements and Standards
III	Filing of Staff and Service Regulations
IV	Records and Reports, Inspection
V	Compliance with Vital Statistics
VI	Facilities, Equipment and Supplies Generally
VII	Transportation Facilities for Abortion Affiliated Services

VIII Elevators
IX Admission and Examination Facilities
X Laboratory Facilities
XI Operating Facilities
XII Recovery Room or Rooms
XIII Staff: Physician in Charge of Abortion Service: Duties
XIV Staff: Nursing Supervision of Abortion Patients
XV Staff: Social Service
XVI Admission and Examination Procedures
XVII Rh Sensitization Prophylaxis
XVIII Operative and Post-Operative Requirements
XIX Closing Abortion Service on Order of Commissioner
XX Hearing

I. *Definitions*:

When used in these regulations:

(a) Abortion Service means a place or facility in which abortions are performed. There shall be two categories of Abortion Service:
  (1) Hospital Abortion Service
  (2) Affiliated Abortion Service

(b) Hospital means a hospital as defined in Chapter 137 of the Municipal Code, City of Chicago.

(c) Hospital Abortion Service means a licensed Chicago hospital in which abortions are performed.

(d) Affiliated Abortion Service means a place or facility in which abortions are performed not located in a licensed Chicago Hospital and which is located within a total transport time of fifteen (15) minutes from a licensed Chicago hospital with which such service has a written affiliation agreement for the treatment of its patients requiring care on an in-patient basis.

(e) Total transport time means the total elapsed time between the diagnosis, at an Affiilated Abortion Service, of a complication requiring emergency

care and the delivery of the patient and the transfer of responsibility for the patient's care to appropriate medical personnel at a hospital.

(f) Qualified Obstetrician means:

(1) A licensed physician who is a diplomate of the American Board of Obstetrics and Gynecology; or who submits evidence to the Chicago Board of Health that his training and experience qualify him for admission to the examination by such Board; or

(2) A licensed physician who is a Fellow of the American College of Surgeons in the specialty of Obstetrics and Gynecology; or The American College of Obstetrics and Gynecology.

(3) A Doctor of Osteopathy who holds a license to practice medicine in the State of Illinois and who is certified by the American College of Osteopathic Obstetricians and Gynecologists, or who submits evidence to the Chicago Board of Health that his training and experience qualify him for admission to the examination by such Board, or who submits evidence of completion of an approved residency in obstetrics and gynecology.

(g) Qualified Surgeon means:

(1) A licensed physician who is a Diplomate of the American Board of Surgery, or who submits evidence to the Chicago Board of Health that his training and experience qualify him for admission to the examination by such Board; or

(2) A licensed physician who is a Fellow of the American College of Surgeons; a Doctor of Osteopathy who holds a license to practice Surgery in the State of Illinois and who is certified by the American College of Osteopathic Surgeons, or who submits evidence to the Chicago Board of Health that his train-

ing and experience qualify him for admission to the examination by such Board or who submits evidence of completion of an approved residency in surgery.

(h) Registered Professional Nurse means a person who is registered as a registered professional nurse by the Illinois State Department of Education and Registration.

II. *Registration, Requirements and Standards*:

(a) No person shall maintain or operate or present himself as maintaining or operating an Abortion Service unless he has first registered such service with the Chicago Board of Health. Registration shall be made on forms furnished by the Chicago Board of Health and shall contain the information required therein. The Board of Health has the right of refusal to register any service that does not comply with the regulations of the Abortion Service. Any change in ownership, physician in charge, staff physicians, staff qualifications, extent of operations, location or affiliation shall be reported to the Chicago Board of Health.

(b) An Abortion Service shall not in any advertisement announcement, letter, circular, poster or sign include any statement expressly or by implication, to the effect that such service is registered with the Chicago Board of Health or that it or its activities are or have been approved by the Chicago Board of Health.

(c) An abortion shall be performed only by a physician licensed to practice in the State of Illinois in an Abortion Service operated in accordance with the provisions of these regulations.

III. *Filing of Staff and Service Regulations*:

An Abortion Service shall be maintained in accordance with a set of formal standards which define the pro-

fessional qualifications of its obstetric, gynecological, surgical, nursing and administrative staff, and which govern the conduct of the service. These standards shall be prepared by the physician in charge of such service and a copy of such standards and any change or modification thereof shall be filed with and approved by the Chicago Board of Health.
(Amended, June 20, 1973, by Chicago Board of Health)

IV. *Records and Reports, Inspection*:

(a) Each Abortion Service shall keep records including admission and discharge notes, histories, results of tests and examinations, nurse's work sheets, social service records, and other progress notes of patients, and it shall submit such records when the Chicago Board of Health shall so require.

(b) Each Abortion Service shall prepare a monthly report which shall be submitted to the Chicago Board of Health on forms prepared by the Chicago Board of Health not later than the 5th day following the end of the month. Such reports shall include the following:

(1) Number of patients requesting abortions
(2) Number of patients and age on whom abortions were performed according to the period of gestation and method of termination of pregnancy
(3) Number of patients for whom abortions were refused and the reasons therefor; and
(4) Number of patients referred to other abortion services
(5) Name and address of patients with a statement of complications following elective abortions describing the nature of the complication.

(c) A statement indicating informed consent in writing and a signed authorization for the performance of an abortion shall be obtained for each patient prior to the procedure.

V. *Compliance with Vital Statistics*:

Abortion Service shall comply with applicable requirements of the Department of Vital Statistics of the City of Chicago and the State of Illinois, which shall include the filing of a death certificate of each aborted fetus after the 20th week of gestation.

VI. *Facilities, Equipment and Supplies Generally*:

Facilities, equipment and supplies in an Abortion Service shall be maintained in proper working order. Necessary solutions, drugs and medications shall be supplied and maintained. Knee or foot controlled sinks shall be provided in or immediately adjacent to the room where the abortion is performed. The abortion service facilities and equipment shall be maintained in a clean and sanitary condition.

VII. *Transportation Facilities for Affiliated Abortion Service*:

An Affiliated Abortion Service shall have immediately available organized transportation facilities capable of insuring that a patient requiring emergency care at the hospital with which such service is affiliated will be transported to such hospital within the total transport time of fifteen (15) minutes.

VIII. *Elevators*:

Any building of more than one story in height and of which an Abortion Service is a part, shall be provided with an elevator for the use of non-ambulatory abortion patients. The elevator shall be of sufficient size to accommodate a standard stretcher. When a non-ambulatory abortion patient is moved from one floor to another, she shall be accompanied by attending medical personnel, or nursing personnel.

IX. *Admission and Examination Facilities*:

An Abortion Service shall provide facilities for registration, medical evaluation, examination and referral, and shall be equipped with suitable furnishings and

accommodations, including waiting and dressing rooms and other appurtenances for the physical comfort and convenience of patients and personnel. Sufficient suitably equipped examining rooms shall be provided for the daily caseload. Nothing contained herein prohibits registration, interviewing, history-taking, medical examination and appropriate referral from being conducted in an existing prenatal, gynecology and/or family planning clinic.

X. *Laboratory Facilities*:

(a) A Hospital Abortion Service shall have on its premises a blood bank, a clinical laboratory, and an X-ray laboratory. The clinical laboratory shall be qualified to perform urinalysis, hematocrit and other hematological tests including cross-matching and determinations of blood group and Rh type. The examinations of surgically removed tissue, tests for pregnancy, and infrequently performed tests, or those not included within specialties or sub-specialties stated on its permit, or those requiring specialized equipment and skill, may be forwarded to another laboratory approved by the Chicago Board of Health.

(b) The affiliation agreement of an Affiliated Abortion Service shall include provision for use in the hospital of those facilities required in Subsection X(a). However, the Affiliated Abortion Service shall have on its premises such facilities as are necessary to perform clinical tests specified in the agreement.

XI. *Operating Facilities*:

(a) A Hospital Abortion Service shall have available on its premises a standard operating room capable of accommodating abdominal as well as vaginal surgical procedures.

(b) For abortions specified in Section XI(a), existing outpatient operating facilities may be utilized

or new outpatient operating facilities created, if the policies established by the physician in charge of the Abortion Service and the patient load warrant. If it is found necessary to add to existing outpatient operating facilities, a standard sized treatment room may be converted to an operating facility.

(c) All rooms in which abortions are performed shall be adequately equipped, supplied and staffed and shall include the following in addition to the instruments and equipment needed for the performance of abortions:

(1) Anesthesia equipment and such other equipment as is necessary to treat patients for hemorrhage, shock, cardiac arrest, and other emergencies.

(2) A Hospital Abortion Service shall have an adequate supply of drugs, compatible whole blood, blood fractions, blood concentrates, plasma expanders and parenteral fluids immediately available at all times with appropriate refrigeration equipment therefor;

(3) An Affiliated Abortion Service shall have an adequate supply of drugs, plasma expanders and parenteral fluids which shall be available at all times with appropriate refrigeration equipment therefor;

(4) Dressing room and scrub-up facilities which are suitably located;

(5) A utility room with facilities for sterilization of supplies, except in an Abortion Service which receives sterile supplies from a central supply service.

(6) A utility room for the cleaning of contaminated materials.

(d) The operating facilities and equipment shall be constructed and maintained so as to be free from sanitary hazards and safety hazards likely to cause a fire or explosion.

(e) Environmental controls to prevent infections, including the control of personnel and patient traffic, shall be maintained in the operating facilities.

XII. *Recovery Room or Rooms*:

An adequately sized and separate recovery room or rooms in proximity to the operating facilities shall be provided. The recovery room shall contain adequate monitoring equipment, suction, oxygen and other related equipment. Such room shall be staffed by qualified nursing personnel. An adequate number of recovery beds and/or rooms shall be provided to insure a minimum of one (1) hour for the recovery of each patient.

(Amended June 20, 1973, by Chicago Board of Health)

XIII. *Staff; Physician in Charge of Abortion Service; Duties*:

(a) An Abortion Service shall be staffed so as to provide on the premises adequate medical, nursing, and ancillary personnel.

(b) The Abortion Service shall be supervised by a physician in charge who shall be a qualified obstetrician or, in a service which does not have a qualified obstetrician, by a qualified surgeon.

(c) The physician in charge of the Abortion Service shall be responsible for:

(1) Setting the standards filed with and approved by the Chicago Board of Health outlining policies and procedures pertaining to abortions and the implementation thereof; and

(2) Designating a licensed physician or physicians whom he deems qualified to supervise directly the care of patients undergoing abortion, including their post-operative care and follow-up.

(3) Establishing standards for the observation of patients by nursing personnel during the post-operative period.

(d) A physician shall be present on the premises of the abortion service at all times during the operative and post-operative period.
(Amended June 20, 1973, by Chicago Board of Health)

XIV. *Staff; Nursing Supervision of Abortion Patients*:

(a) At least one registered professional nurse with post-graduate education or experience in obstetric or gynecological nursing shall supervise and direct the nursing personnel and care and shall be on duty in an abortion service at all times while in use.

(b) Student nurses, practical nurses, attendants and other ancillary personnel assigned to give nursing care in an Abortion Service shall be adequately trained in observation and emergency techniques for pre-operative and post-operative care of abortion patients and shall be under the direct personal supervision of a registered professional nurse at all times.

XV. *Staff; Social Service*:

An Abortion Service should have a social service unit available to serve its patients adequately.

XVI. *Admission and Examination Procedures*:

(a) Every woman seeking to terminate her pregnancy shall be registered as expeditiously as possible and, whenever possible, on the same day of registration shall be seen by a physician and staff for history taking, physical examination and necessary laboratory tests.

(b) The diagnosis of pregnancy shall be the responsibility of the examining physician.

(c) A complete medical history shall be obtained and the physical examination shall be complete and not confined solely to a pelvic examination. The following laboratory tests shall be performed on every patient: hematocrit, Rh factor, complete

urinalysis, blood grouping by the blood bank in the event a cross-matching test for transfusion is required.

(d) Where medical evaluation, examination and referral are made from a private physician's office, hospital, clinic or other Abortion Service, pertinent records thereof shall be made available at the time the patient is registered and admitted to the Abortion Service. Proper policies and procedures for coordination or referral from various sources shall be established by the physician in charge of the Abortion Service and adhered to by all members of the staff.

(e) There shall be an interval of not less than twenty-four (24) hours between initial examination and termination of pregnancy to permit the reporting to and review of all laboratory tests by the examining physician and to permit and encourage thorough consideration and a firm decision by the patient regarding termination of pregnancy. No patient shall be coerced in any matter by the staff of the Abortion Service in arriving at her decision.

(Amended June 20, 1973, by Chicago Board of Health)

XVII. *Rh Sensitization Prophylaxis*:

Each Abortion Service shall provide Rh factor sensitization prophylaxis to all Rh negative patients according to standard medical procedures.

XVIII. *Operative and Post-Operative Requirements*:

(a) Abortions on patients with a gestation up to and including twelve weeks as determined by the physician may be performed on an ambulatory basis in an abortion service if the patient's medical condition permits.

(b) The following patients shall be treated only on an inpatient basis for the abortion:

(1) Patients pregnant more than twelve weeks as determined by the physician;

(2) Patients having such medical, surgical, gynecological or psychiatric conditions or complications as specified in the rules of the chief of staff of the Abortion Service and filed with and approved by the Chicago Board of Health.
(Amended June 20, 1973, by Chicago Board of Health)

(c) Only physicians shall be permitted to perform abortions. Termination of pregnancies involving more than twenty weeks gestation shall not be performed by the physician without appropriate medical consultation as required by the laws of the State of Illinois.

(d) Where general or local anesthesia is administered to abortion patients it shall be administered by personnel qualified by education and training.

(e) Pathologic examination of all tissue removed from the uterus shall be performed routinely.

(f) Patients shall receive the following post-operative care:

(1) Patients whose pregnancy was terminated on an ambulatory basis shall be observed in the Abortion Service for a reasonable period of one hour to ensure that no immediate post-operative complications are present;
(Amended June 20, 1973, by Chicago Board of Health)

(2) Patients in an Affiliated Abortion Service in whom any adverse condition exists or in whom a complication is known or suspected to have occurred during or after the performance of the abortion shall be transferred and admitted to a back-up hospital.
(Amended June 20, 1973, by Chicago Board of Health)

(g) Written instructions filed with, and approved by the Chicago Board of Health shall be issued to all patients in accordance with the rules of the physician in charge of the Abortion Service and shall include the following:
(Amended June 20, 1973, by Chicago Board of Health)

(1) Symptoms of complications to be looked for,
(2) Activities to be avoided,
(3) Specific telephone number to be used by the patient should any complication occur or question arise,
(4) Date for follow-up or return visit after the performance of the abortion which shall be scheduled within two or six weeks as indicated by the condition of the patient,
(5) Information on availability of family planning services when desired by the patient. When, in the opinion of the physician it is in the best interests of the patient, family planning services may be initiated, with the consent of the patient, prior to leaving the abortion service.

XIX. *Closing Abortion Service*:

Whenever an inspection determines that an Abortion Service has failed to register in accordance with Section II(a) of these regulations or continued operation of such an Abortion Service would be found to be in violation of any of the sections of the Abortion Service regulations, the Board of Health may direct the Commissioner of Health to order the discontinuance of operations until the Abortion Service is registered or until the Board of Health is satisfied that the violations are corrected, such order shall be served in writing, personally, upon the owner or person in charge.

XX. *Hearing*:

An Abortion Service served with an order to discontinue operations pursuant to Section XIX above, may

request a Hearing before the Board of Health on said order of discontinuance in writing by serving said request on the Commissioner of Health, in person, or by certified mail, return receipt requested. The Board of Health or its designated officer shall schedule a Hearing within seven (7) days of the receipt of such a request.

May 16, 1973

APPENDIX D

CHICAGO BOARD OF HEALTH
ABORTION SERVICE REGISTRATION FORM

I. Name of Facility: _____

Address: _____

Telephone Numbers:

Administration: _____

Patient Registration: _____

Patient Emergency: _____

II. TYPE OF FACILITY:

State whether facility is a hospital or an Affiliated Abortion Service; professional corporation; group or individual practice, other (specify):

_____

_____

III. AFFILIATION:

If facility is an Affiliated Service, attach a certified written letter or copy of agreement signed by the hospital administrator.

Name of Hospital Affiliate: _____

Address: _____

IV. TRANSPORTATION:

Specify arrangements for transportation to back up facility in event of an emergency:

_____

_____

_____

_____

V. OWNERSHIP:

A. Non-Profit:
Church Operated: _____
Church Affiliated: _____
Other Non-Profit: _____

B. Proprietary:
Individual: _____
Partnership: _____
Corporation: _____

Other: (explain) _____

C. Date incorporated under the laws of the State of Illinois _____

D. Owned By: _____

E. Operated By: _____
(Name of Agency, Organization, Association, Corporation or Individual)

F. Official name of governing body: _____
(i. e., Board of Trustees, Board of Directors, etc.)

H. Officers of the governing body (non-profit hospitals list officers of governing body. Proprietary facilities list name and address of individual owner, partners, or officers of corporation.)

	NAME	ADDRESS
President:		
Vice-President:		
Secretary:		
Treasurer:		

VI. ADMINISTRATION:

Administrator: _____ Title: _____

Date Appointed to Position: _____

Full Time _____ Part Time _____

If part time, what other position or employment: _____

Training of Administrator: _____

VII. MEDICAL DIRECTOR:

Name: _____

Address: _____

M.D. _____ D.O. _____

Location of other practices of Medical Director: _____

Specialty Board Qualifications:

_____

_____

Is the Medical Director always present while abortions are being performed?

Yes: _____ No: _____

If no, who supervises: _____

Number of hours spent on premises of the abortion service by the Medical Director per week: _____

VIII. MEDICAL COVERAGE:

Is there a licensed physician on the premises at all times patients are present? Yes: _____ No: _____

Name of Staff Members Performing Abortions:

Name-Address of Private Practice	Status *	Specialty Board Qualifications and Certification

*Full or part time

Medical, Psychiatric and Other Consultants:

Name-Address of Private Practice	Specialty Board Qualifications

IX. NURSING SERVICE:

Name of Person In Charge: _____

Title: _____

Current Illinois Registration Number _____

Training:

School of Nursing Graduate: Yes: ____ No: ____

University or college training: ____ Number of Years: ____

Degree in Nursing? _____ Other Degree? _____

Post-Graduate education in obstetrics and/or gynecology? ____

Date(s): _____ From what institution? _____

_____

Specify other experience in obstetrics and/or gynecology:

_____

_____

_____

X. DIRECTOR OF SOCIAL SERVICE:

Name: _____

Degrees: _____

_____

XI. RADIOLOGICAL SERVICE:

Is Radiological Service provided in the facility: Yes____ No____

Name of Physician in charge of service: _____

Is he board certified? _____

XII. LABORATORY SERVICES:

Is Laboratory Service provided in the facility? Yes____ No____

If not, name affiliated hospital providing this service: _____

_____

Name types of services provided: _____

_____

_____

Name of person in charge of service: _____

If board certified, name board: _____

XIII. BLOOD BANK SERVICE:

Blood Obtained from:

Commercial Blood Bank: _____

Hospital Blood Bank: _____

Volunteer Donors: _____

Do you have the facilities to keep an adequate supply of blood on hand at all times? Yes_____ No_____

XIV. ANESTHESIA:

Specify method of Anesthesia:

Local_____ General_____ Other (Specify)_____

Director of Anesthesiology: _____

Qualifications of Director: _____

_____

Is the anesthesiologist on call? Yes_____ No_____

If only on call, who administers anesthesia? _____

_____

_____

XV. EXTENT OF OPERATIONS:

Which floors of the facility will be occupied by the abortion service?

_____

Does the building have elevator service? Yes_____ No_____

In Patient Service:

Number of Beds: _____

Number of patients anticipated to be treated daily: _____

Days and hours of operation: _____

Number of Recovery Beds: _____

Out Patient Service:

Number of rooms for abortion procedure: _____

Number of Recovery Beds: _____

Number of patients anticipated to be treated daily: _____

Days and hours of operation: _____

XVI. PREGNANCY TESTING:

Required before registration: Yes_____ No_____

Required at time of examination: Yes_____ No_____

Specify type of test employed: _____

_____

XVII. PERIOD OF GESTATION ACCEPTABLE:

Under 10 Weeks_____ 10 to 12 Weeks_____ 13 to 15 Weeks _____ 16 Weeks and over _____

XVIII. PROCEDURES EMPLOYED:

Suction: _____ Dilatation and curettage _____

Hypertonic Saline _____ Hysterotomy _____

Other: (Specify) _____

XIX. SOURCES OF REFERRAL:

Specify all sources of referrals, giving proper street address and person in charge of Referral Service:

_____

_____

_____

_____

XX. PREVIOUS ACTIONS BY CHICAGO BOARD OF HEALTH:

	Yes	No
Has the service ever been registered with the Chicago Board of Health?	_____	_____
Has the service been surveyed by the Bureau of Institutions and Medical Care Facilities, Chicago Board of Health?	_____	_____
Have blueprints of the abortion service ever been submitted to this Bureau for review?	_____	_____

XXI. COSTS:

What are the approximate total charges to the patient for procedures performed at this facility?

Suction _____ Saline instillation _____

Hysterotomy _____ Dilation and curettage _____

Other procedures (Specify procedure and cost) _____

_____

Financial Data	Yes	No
Does this include the services of the physi- who performs the procedure?	_____	_____
Does patient pay cost of additional hospitalization if required for treatment of complications?	_____	_____
Is Rhogam included in total costs? If not, what additional charge made?	_____	_____
Is facility eligible for Medicaid reimbursement?	_____	_____
Are Medicaid patients accepted?	_____	_____
Are any uninsured patients served free of charge?	_____	_____

XXII. REPORTING:

	Yes	No
Is facility filing Certificates of Termination of Pregnancy—20 weeks or less with the Chicago Board of Health?	_____	_____
Is facility filing Abortion Report forms with the Chicago Board of Health?	_____	_____

XXIII. CONTRACEPTIVE COUNSELING:

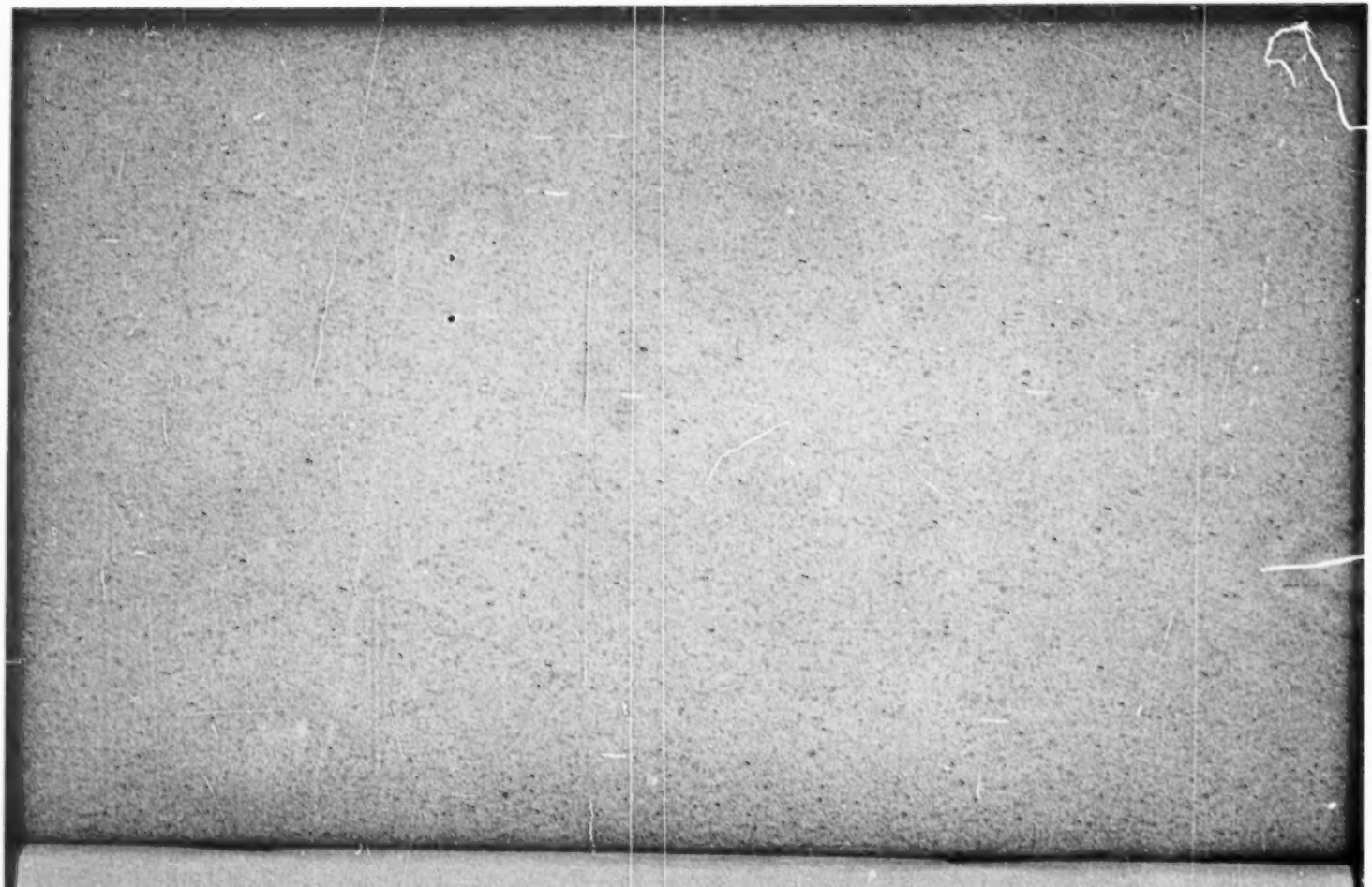
	Yes	No
Is contraceptive counseling given?	_____	_____

NOTE: Any change in ownership, physician in charge, staff physicians, staff qualifications, extent of operations, location or affiliate hospital shall be reported to the Chicago Board of Health.

SIGNED (Administrator) _____

MEDICAL DIRECTOR _____

DATE SUBMITTED _____



SUPREME COURT, U. S.

No. 74-935

FILED
FEB 25 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

THE CHICAGO BOARD OF HEALTH, and DR. ERIC OLDBERG, SAMUEL A. GOLDSMITH, WALTER MULLADY, DR. MARY KELLY MULLANE, DR. ROBERT STEPTO, EDWARD W. HUSSEY, and MICHAEL ROSENBERG, Individual Members of the Chicago Board of Health,

Petitioners,

vs.

FRIENDSHIP MEDICAL CENTER, LTD. and T. R. M. HOWARD,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JULIAN B. WILKINS
ROBERT L. GRAHAM
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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-935

THE CHICAGO BOARD OF HEALTH, and DR. ERIC OLDBERG, SAMUEL A. GOLDSMITH, WALTER MULLADY, DR. MARY KELLY MULLANE, DR. ROBERT STEPTO, EDWARD W. HUSSEY, and MICHAEL ROSENBERG, Individual Members of the Chicago Board of Health,

Petitioners,

vs.

FRIENDSHIP MEDICAL CENTER, LTD. and T. R. M. HOWARD,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents pray that the Petition for a Writ of Certiorari be denied.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 505 F.2d 1141 (1974), and appears in Appendix A of the Petition for Writ of Certiorari.

The Memorandum Opinion and Order of the District Court are reported at 367 F.Supp. 594 (N.D. Ill. 1973) and appears in Appendix B of the Petition for a Writ of Certiorari.

JURISDICTION

The jurisdictional statement is adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether this Court's holding that a woman's right of privacy is broad enough to encompass her decision to have an abortion renders unconstitutional Board of Health regulations which single out abortion clinics for specialized standards and procedures applicable to all abortions, regardless of the trimester, and which are not applied to other surgical procedures of similar complexity and risk.

2. Whether this Court should reject its holding in *Roe* v. *Wade,* that the state's interest in the health and safety of women undergoing abortions does not become compelling until the end of the first trimester of pregnancy.

3. Whether a physician who is closely involved in the abortion decision-making process and who is subject to arrest and loss of his clinic's license for failure to comply with licensing Regulations has standing to chailenge those Regulations on the ground that they interfere with the fundamental right to privacy guaranteed by the Fourteenth Amendment.

ORDINANCES INVOLVED

The Chicago Board of Health regulations for abortion services appear in Appendix C to the Petition for a Writ of Certiorari.

Petitioners have neglected to include one portion of the Chicago Municipal Code that is relevant to this case. Section 9-5 of the Code states:

> The president of the board of health, the assistant to the president of the board of health, the secretary of the board of health, the commissioner of health, and all physicians, employes or inspectors, who may be designated by the board of health shall have full police powers and shall have the right to arrest or cause to be arrested any person who violates any of the health provisions of this code.

STATEMENT OF THE CASE

The Statement of the Case is adequately presented in the Petition. For greater detail, this Court may refer to the Statement in Respondents' Brief filed in the Seventh Circuit Court of Appeals below.

REASONS FOR DENYING THE WRIT

Introduction

The unanimous decision below by the United States Court of Appeals for the Seventh Circuit is in total compliance with *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973). This case tenders no issues which have not already been resolved by this Court in its well-considered opinions in those cases.

I.

BECAUSE THIS COURT HAS RULED THAT THE STATE HAS NO COMPELLING INTEREST IN REGULATING ABORTIONS PERFORMED IN THE FIRST TRIMESTER OF PREGNANCY, PETITIONERS PRESENT NO NEW QUESTIONS OF FEDERAL LAW AND THE SEVENTH CIRCUIT'S RULING DOES NOT MERIT REVIEW.

This Court's decisions in *Roe* v. *Wade, supra,* and *Doe* v. *Bolton, supra,* held that the right of personal privacy guaranteed by the due process clause of the Fourteenth Amendment encompasses the right of a woman and her physician to terminate the woman's pregnancy. *Roe* v. *Wade, supra,* at 154. In those cases this Court declared that the fundamental right of privacy can be restricted only by the demonstration of a compelling and necessary state interest. *Id.,* at 155.

Nevertheless, Petitioners maintain that because the City's police powers are being invoked to protect the

health and safety of women undergoing abortions,* a rational relationship need only be established between the City ordinance and the end it seeks to promote. Petitioners' Brief for Certiorari [hereinafter "Petition"] at 12. This hypothesis overlooks the fundamental nature of the right to privacy, and ignores the judicial test mandated by countless Supreme Court decisions.

> Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," *Kramer* v. *Union Free School District,* 395 U.S. 621, 627 (1969); *Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1969); *Sherbert* v. *Verner,* 374 U.S. 398, 406 (1963), and that legislative enactments must be narrowly drawn to express only the legitimate state interest at stake. *Griswold* v. *Connecticut,* 381 U.S. at 485; *Aptheker* v. *Secretary of State,* 378 U.S. 500, 508 (1964); *Cantwell* v. *Connecticut,* 310 U.S. 296, 307-308 (1940); *see Eisenstadt* v. *Baird,* 405 U.S. at 460, 463-464 (White, J., concurring in result.)

Roe v. *Wade, supra,* at 155-156.

The Petitioners assert the right to regulate extensively abortion clinics without regard for the stage of pregnancy. However, this Court has already ruled that the state's interest in the health of the mother does not become compelling until the end of the first trimester of pregnancy.

---

* At one point Petitioners' claim this is the "sole" purpose behind the regulations. Petition, at 3. The Regulations themselves belie the falsity of this claim. Regulation XVI(e), for example, requires that a woman wait at least twenty-four hours between the time of her initial examination by the doctor and the termination of the pregnancy ". . . to permit the reporting to and review of all laboratory tests by the examining physician and *to permit and encourage thorough consideration and a firm decision by the patient regarding termination of pregnancy.*" Petition, Appendix C, at 57a (Emphasis added). That such a requirement directly affects the decision to have an abortion can hardly be doubted.

> *With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester . . . It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.* Examples of permissi ble state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; *as to licensing of the facility; and the like.*
>
> *This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.*

Roe v. *Wade, supra,* at 163. (Emphasis added).

The Court of Appeals below did not, as Petitioners maintain, "seize" on this language in the Supreme Court's opinion. Petition, at 9. Rather, the Court of Appeals followed the *Roe* holding which was clearly enunciated by this Court.

To summarize and to repeat: . . .

> (a) For the stage prior to approximately the end of the first trimester, *the abortion decision and its effectuation* must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage *subsequent to approximately the end of the first trimester*, the State, in promoting its interest in the health of the mother, may, if it chooses,

> regulate the abortion procedure in ways that are reasonably related to maternal health.

410 U.S. at 164 (Emphasis added).

In *Roe* v. *Wade*, this Court invalidated state statutes precisely because they attempted to regulate abortion without regard to the stage of pregnancy. Similarly, in *Doe* v. *Bolton*, the Court considered a hospital requirement failing to exclude the first trimester of pregnancy and concluded:

> We hold that the hospital requirement of the Georgia law, because it fails to exclude the first trimester of pregnancy . . . is also invalid.

410 U.S. at 195.

These holdings unequivocally prohibit state intervention in the abortion decision-making process or in the manner in which such a decision is effectuated during the first trimester. Despite this fact, Petitioners assert a right to regulate "where, how and by whom an abortion may be performed" regardless of the stage of pregnancy. Petition, at 9. This Court has clearly held that such regulations may be proper *after the first trimester* of pregnancy but only when they are reasonably related to the state's interest. *Roe* v. *Wade*, *supra*, at 163.

This Court has held that during the early stages of pregnancy the abortion decision "*in all its aspects* is inherently and primarily a medical decision, . . ." *Roe* v. *Wade*, *supra*, at 166, (Emphasis added).* The Seventh Circuit acknowl-

---

* Petitioners' reliance on *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973) is ill-founded. *Rodriguez* was concerned with the constitutional relationship of disparate rights (education, voting and freedom of speech). In this case we are concerned with *one* distinct right—the right to make and effectuate the decision to have an abortion during the first trimester of pregnancy. The decision to have an abortion is intricately related to the procedures and expenses involved. During the first trimester, the standards of the medical profession, not the state, must be looked to for necessary guidance and direction.

edged, as did this Court, that appropriate remedies are available should any physician abuse the privileges of his or her position. *Roe* v. *Wade, supra* at 166; *Friendship Medical Center, Ltd.* v. *Chicago Board of Health, et al.*, 505 F.2d 1141, 1152-53 (7th Cir. 1974). The Seventh Circuit's holding that the Abortion Regulations constituted an unnecessary encroachment upon the physician's right to exercise his medical judgment was mandated by this Court's 1973 abortion decisions. A contrary decision would have discounted ". . . the reality that the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health." *Doe* v. *Bolton, supra*, at 208 (Burger C.J., concurring).

We emphasize, as did the Court of Appeals, that this is not a case where the City purports to regulate abortions ". . . as it does other surgical procedures . . ." *Roe* v. *Wade, supra* at 170-171 (Stewart, J., concurring.) Rather, as Petitioners concede, the Board of Health has singled out abortion procedures for regulations that do not apply to other medical procedures of the same risk and complexity. The Seventh Circuit determined that this regulatory scheme violated the Equal Protection Clause of the Fourteenth Amendment because it adversely affected the fundamental right of privacy enunciated in *Roe* v. *Wade* by treating differently without a compelling reason medical procedures which are indistinguishable in terms of health risks. *Friendship Medical Center, supra*, 505 F.2d at 1153.

Because of the sweeping overbreadth of the Abortion Regulations, this Court need not decide what legal presumption should be given to health and safety ordinances affecting second trimester abortions. We note however, that in arguing for a presumption of statutory validity, Petitioners once again ignore the fundamental nature of the right to privacy. *See supra* at p. 5. This right

remains operative throughout a woman's pregnancy. *Roe* v. *Wade, supra,* at 159. Consequently, while the ruling was unnecessary to its decision in this case, the Seventh Circuit was correct in concluding that the government must demonstrate that regulations affecting second trimester abortions are reasonably related to a valid state interest.

The Seventh Circuit's opinion is not in conflict with any other Court of Appeals' decisions and is supported by the overwhelming weight of judicial authority. When confronted with regulations similar to those promulgated by the Chicago Board of Health, the Eighth Circuit reached a conclusion identical to that reached by the Seventh Circuit. *Word* v. *Poelker*, 495 F.2d 1349 (8th Cir. 1974). The Court noted therein that:

> While we agree with appellee that the ordinance does not proscribe abortions, we do not agree that that fact, of itself, removes the ordinance from the constitutional realm of *Roe* and *Doe*. The *Doe* decision clearly struck down portions of the Georgia statute governing abortion procedures. *Doe* at 192-200. We learn from *Doe* that sweeping regulation of the abortion procedure without regard for the conflicting interests involved will not withstand constitutional scrutiny.

495 F.2d at 1351.

Similarly, even before *Roe* v. *Wade, supra,* the U.S. Court of Appeals for the District of Columbia suspended enforcement of an abortion clinic regulation to prevent "irreparable injury" in a case strikingly similar to the present one. *WONAAC* v. *D. C. City Council*, No. 72-2010 (D.C. Cir. 1972) (not reported) (*See,* Appendix A, *infra*).

Other courts have also recognized that the regulation of abortions by the state in the first trimester of pregnancy is invalid. In *Coe* v. *Gerstein*, 376 F. Supp. 695, 696 (S.D.

Fla. 1973) (three judge panel), *appeal dismissed, cert. denied per curiam* 417 U.S. 279 (1974), the government itself expressly abandoned its defense of Florida's regulations affecting first trimester abortions after the decisions in *Roe* v. *Wade* and *Doe* v. *Bolton* were announced. A three judge federal panel in Minnesota also concluded that state regulation of abortion procedures could not be justified during the first trimester. *Hodgson* v. *Spannus*, 378 F. Supp. 1008 (D.C. Minn. 1974), *appeal dismissed*, 43 USLW 3415 (1974).

The same result was reached in *Hallmark Clinic* v. *Department of Human Resources*, 380 F. Supp. 1153 (E.D. N.C. 1974), where a three judge panel held the state's requirement that an abortion clinic secure a written transfer agreement with a local hospital infringed on the woman's right to a first trimester abortion free of state interference.

In addition, the New York Court of Appeals invalidated first trimester regulations in *People* v. *Dobbs Ferry Medical Pavilion*, 33 N.Y.2d 584, 301 N.E.2d 435 (1973) (per curiam). Moreover, officials in New York City and the State of Washington have voluntarily withdrawn their first trimester abortion clinic regulations acknowledging that they were constitutionally invalid. *See* Appendix B and Appendix C to this brief, *infra*.*

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* The law review analyses of post-*Roe* abortion legislation agree that the only legitimate qualification on first trimester abortion procedures is that a physician perform the operation. *See, e.g.*, Comment, *A Proposed Statute for Implementing The Abortion Decisions*, 13 Journal Family Law 332, 334-336 (1973-1974); Comment, *Landmark Abortion Decisions: Justifiable Determination or Miscarriage of Justice?—Proposals for Legislative Response*, 4 Pacific L.J. 821, 848-850 (July 1973); Recent Legislation, *Constitutional Validity of the Tennessee Abortion Statute*, 4 Memphis St. U. L. Rev. 593, 594 (1974).

Against this overwhelming body of authority, Petitioners can cite no instance in which any court has upheld regulations affecting first trimester abortions after acknowledging the fundamental nature of a woman's decision to terminate her pregnancy. No conflict exists among the various Circuits necessitating a ruling from this Court. Because this Court has already ruled that the state's interest in protecting a woman's health becomes compelling only at the end of the first trimester of pregnancy, the Seventh Circuit's decision is correct and the Petition for a Writ of Certiorari should be denied.

II.

THE SEVENTH CIRCUIT'S FINDING THAT RESPONDENTS HAD STANDING TO CHALLENGE THE ABORTION REGULATIONS AS AN UNCONSTITUTIONAL INTERFERENCE WITH THE FUNDAMENTAL RIGHT OF PRIVACY WAS BASED ON THE HOLDINGS OF THIS COURT AND IS CONSISTENT WITH ALL OTHER CIRCUIT COURT OPINIONS.

In *Doe* v. *Bolton, supra,* this Court concluded that licensed physicians consulted by pregnant women had standing to challenge Georgia's anti-abortion statute. 410 U.S. at 188. It was conceded that the doctor-plaintiffs in that case had not been prosecuted or threatened with prosecution for violation of those statutes. Nevertheless, this Court held that:

> The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a

> criminal prosecution as the sole means of seeking relief.

Id., at 188.

In its well-reasoned opinion, the Seventh Circuit perceived what Petitioners have repeatedly failed to acknowledge: namely, that the Abortion Regulations promulgated by the Board of Health are directly supported by Municipal Code provisions that give the Board "full police powers" enforceable by the "right to arrest" violators of the health provisions of the Code. Chicago Municipal Code § 9-5.

Moreover, the Abortion Regulations specifically provide for the closing down of facilities deemed in non-compliance with the Regulations. As the Court of Appeals aptly noted:

> It is precisely this continuing restrictive effect placed on the plaintiffs by the regulations which is the basis of this complaint.

Friendship Medical Center, supra, 505 F.2d at 1146. Like the statute under attack in *Doe* v. *Bolton, supra,* the Abortion Regulations are "recent and not moribund." 410 U.S. at 188. Consequently, Petitioners' reliance on *Poe* v. *Ullman,* 367 U.S. 497 (1961), is misplaced. Given these governmental sanctions, Respondents clearly alleged a sufficient personal stake in the controversy to afford them standing to challenge the Abortion Regulations.

Petitioners' contention that the Respondents lacked standing to challenge the Abortion Regulations as an unreasonable interference with the fundamental right of privacy protected by the Fourteenth Amendment is totally without merit. The Seventh Circuit properly followed this Court's holdings in *Griswold* v. *Connecticut,* 381 U.S. 479, 481 (1965), *Eisenstadt* v. *Baird,* 405 U.S. 438, 443-446 (1972), and *Doe* v. *Bolton, supra,* 410 U.S. at 188-189.

The attending physician's role in the abortion decision is so intimate and central that it would be incongruous not to allow him to challenge the Abortion Regulations on privacy grounds.

> . . . for the period of pregnancy prior to this "compelling" point, *the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment the patient's pregnancy should be terminated.*

Roe v. *Wade, supra,* at 163 (Emphasis added).

The Abortion Regulations impermissibly infringe on the fundamental right of a woman and her physician to decide to terminate the woman's pregnancy. Because of the unique quality of the doctor-patient relationship in this context, and for the other reasons amply delineated in the Seventh Circuit's opinion, the Court was correct in holding that Respondents had standing to attack the Abortion Regulations as an interference with the right to privacy protected by the Fourteenth Amendment.

There is no conflict among the various Circuits as to a physician's standing to raise the privacy challenge. In *Abele* v. *Markle,* 452 F.2d 1121, 1125 (2d Cir. 1971), *vacated on other grounds,* 410 U.S. 951 (1973), the Court held that the physician-plaintiffs alleged a sufficient threat of personal harm to give them standing to challenge Connecticut's anti-abortion law on privacy grounds. The Eighth Circuit reached a similar conclusion in *Nyberg* v. *City of Virginia,* 495 F.2d 1342 (8th Cir. 1974), *appeal dismissed, cert. denied,* 43 U.S.L.W. 3224 (1974).* In a reference

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* The standing of physicians to challenge abortion regulations on privacy grounds was unquestioned in several other cases. *Word* v. *Poelker,* 495 F.2d 1349 (8th Cir. 1974); *Hallmark Clinic* v. *Department of Human Resources,* 380 F.Supp. 1153 (E.D.N.C. 1974); *Hodgson* v. *Spannus,* 378 F.Supp. 1008 (D.C. Minn. 1974). *See also, Doe* v. *Scott,* 321 F.Supp. 1385 (N.D. Ill. 1971) (three judge court), *vacated on other grounds,* 410 U.S. 950 (1973).

to the Supreme Court's discussion of the standing issues in *Doe* v. *Bolton*, the Eighth Circuit in *Nyberg* noted:

> The impact of the Court's discussion cannot be fairly said to limit standing to sue in abortion cases to pregnant women . . . Clearly, the claims of medical doctors to 'freely practice medicine according to the highest medical standards without arbitrary outside restraints' are inexplicably bound up with the privacy rights of women who seek abortions.

495 F.2d at 1344.

The Seventh Circuit's ruling that Doctor Howard and the Friendship Medical Center had standing to challenge the Abortion Regulations as an invasion of the right to privacy protected by the Fourteenth Amendment is consistent with all other Court of Appeals' decisions and with prior opinions of this Court. Consequently, the Seventh Circuit's opinion does not merit review.

CONCLUSION

Respondents respectfully pray that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit
September Term, 1972

No. 72-2010 Civil Action 1991-72

Wonaac, Laurel Clinic, Inc.
Dr. Milan M. Vuitch, et al.,
Appellants

v.

District of Columbia City
Council, et al.,
No. 72-2011 Civil Action 1993-72
Mathias J. Coleman, M.D.
Summit Medical Center, Inc.,
et al.,
Appellants

v.

Walter E. Washington, et al.,
No. 72-2012 Civil Action 2001-72
Pre-Birth, Inc.,
Appellants

v.

John A. Nevius,
et al.,

Before: Wright and Robinson, Circuit Judges

O R D E R

On consideration of appellants' motion for stay and interlocutory injunction, it appearing to the Court that a serious question regarding the validity of the Abortion

Control Regulation of the District of Columbia has been raised; and it further appearing that enforcement of the Regulation may result in irreparable injury to the parties at whom the Regulation is directed, it is

Ordered that enforcement of the Regulation is stayed pending further order of the District Court, following a hearing afforded the parties with all possible speed on appellants' motions for a preliminary injunction. See *Application of the President and Directors of Georgetown College, Inc.*, 118 U.S. App. D.C. 80, 331 F.2d 1000, cert. denied, 377 U.S. 978 (1964); *Dilworth* v. *Riner*, 343 F.2d 226 (5th Circuit 1965).

Per Curiam

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WONAAC, et al.,

Plaintiffs

Civil Action No. 1991-72 v.

D. C. CITY COUNCIL, et al.

Defendants

PRE-BIRTH, INC.

Plaintiffs

Civil Action No. 2001-72 v.

JOHN A. NEVIUS, et al.

Defendants

MATHAIS J. COLEMAN, M.D., et al.

Plaintiffs

Civil Action No. 1993-72 v.

WALTER E. WASHINGTON

Defendant

ORDER

This matter having come before the Court upon defendants' motion to dismiss, together with memorandum of points and authorities in support thereof, and it appearing to the Court that the instant case is now moot, it is, by the Court, this 9th day of February, 1973,

Ordered: That the complaint be, and the same is, hereby dismissed as moot.

/s/ J. H. Pratt
Judge

APPENDIX B

THE CITY OF NEW YORK

HEALTH SERVICES ADMINISTRATION

Date March 30, 1973

To—

Joseph Cimino, M.D., M.P.H.
Chairman, Board of Health

From—

Harold Stults, Counsel N.Y.

Subject—

Constitutionality of the Regulation of First Trimester Abortions under Article 42 of the Health Code in light of *Roe* v. *Wade*, ... U.S. ..... (Wade), and *Doe* v. *Bolton*, ... U.S. ..... (Bolton)

You have asked for my opinion on the effect of the Supreme Court's *Wade* and *Bolton* decisions on the N.Y.C. Health Code provision (in Article 42) affecting first trimester abortions. This opinion is based upon an analysis of the guiding principles the Court used in *Wade* and *Bolton*, which I believe would guide the Court in determining the constitutionality of regulations like those found in Article 42.

The Court concluded that for first trimester abortions

> "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician . . . free of interference by the State." (*Wade*, at 48, 49).

Only beginning with second trimester abortions may a state

> "regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." (*Wade* at 47, 48).

Although the rationale for this sharp distinction between first and second trimester abortions is not clear, it

is primarily based upon the increase in the risk to a woman's health from an abortion that occurs after the first trimester. The Court determined that maternal health is adequately protected in first trimester abortions (as in other surgical procedures), by State requirements for the licensing of physicians, by license revocation or suspension proceedings, and by malpractice lawsuits, and it ruled that any regulations that have the effect of limiting a woman's right to have a first trimester are unconstitutional, even though these regulations are directed at further protecting maternal health. In other words, the test that is to be applied in determining whether first trimester abortion regulations are constitutional is not whether the regulations are reasonable or necessary to protect maternal health. The sole test for first trimester abortion regulations is whether the regulations permit the woman, together with her physician, to terminate her pregnancy without government interference.

Hence, Article 42 of the Health Code, as far as first trimester abortions are concerned, must be amended to eliminate any regulation which *de facto* would interfere in any significant way with a mother's ability to exercise her right, together with her doctor, to terminate her pregnancy. No regulation may, therefore, limit a woman's right to an abortion *indirectly* through restrictions on her doctor that would, for example, require the doctor to work in a specific manner, with specific equipment and staff, or in a specific type of facility. Included in this first trimester prohibition would be any *prior* registration or reporting requirements, which if not complied with, would prevent a physician from performing first trimester abortions.

The sections of the Health Code which require data collection, termination of pregnancy certificates and other incidental *post*-abortion clerical acts, however, in no sig-

nificant way interfere with a woman's right and ability, together with her physician, to terminate her pregnancy during the first trimester. Since they do not affect a woman's constitutional rights, they are permissible controls on first trimester abortions. The needed changes in Article 42 vis-a-vis first trimester abortions may be brought about in two basic steps:

1. Sections 42.21(b) and 42.33(a) are the only sections of Article 42 which deal only with first trimester abortions, and *permit* outpatient procedures. Since under *Wade* and *Bolton* we cannot require any particular modality or treatment for first trimester abortions, regulations permitting a particular type of treatment now have very little meaning. Therefore, both these sections should be eliminated.

2. Almost all the remaining sections would significantly limit a woman's right to have her pregnancy terminated by restricting her doctor's manner of practice, use of equipment and staff or work in a particular type of facility or by requiring the doctor's *prior* registration. These sections should be redefined to omit reference to first trimester abortions, although post-abortion clerical requirements and the general enforcement provisions of Article 42 (found in §§42.03(c), 42.05, 42.07, 42.09, 42.34) may be retained. These changes may be accomplished by first amending section 42.01(a) to read as follows:

> (a) Abortion service means a place or facility in which abortions *on patients with a gestation of more than twelve weeks* are performed (.) *except that for the purposes of §§ 42.03(c), 42.05, 42.07, 42.09, 42.34, abortion service means any place or facility in which abortions are performed.*

and by amending the first sentence of §42.03(a) to read:

> (a) No person shall maintain or operate or represent himself as maintaining or operating an abortion

service *in which abortions on patients with a gestation of more than twelve weeks are performed* unless he first registers such service with the Department.

By amending these two subsections in this way, all prior restraints on a mother's right to have her physician perform an abortion are eliminated.

The Board of Health may of course consider new regulations applicable to first trimester abortions so long as they are designed to comply with the Supreme Court's guidelines as discussed above. Such new regulations would be permissible if, like the termination of pregnancy certificate requirement and the post abortion data requirement, they would interfere in no significant way with a woman's right and ability to have her doctor terminate her pregnancy during the first trimester. On the other hand, they could not indirectly limit a woman's rights by restricting her doctor through, for example, requiring specified types of treatments, type of facilities, equipment or staffing. Other post-abortion clerical requirements, if not burdensome, would probably satisfy the Supreme Court's guidelines in this area.

Non-binding standards of an advisory or informational nature, even if officially sanctioned would also be permitted since they do not interfere with a woman's right, together with her physician, to terminate her pregnancy. Such non-binding standards, and the evaluation of specific physicians or abortion services in light of those standards may be publicized.

There remain some unresolved questions concerning the constitutionality of certain Article 42 provisions affecting second trimester abortions. These questions relate primarily to whether it can be shown that certain provisions are important enough to the protection of maternal health to meet constitutional standards. These questions will be dealt with in a subsequent opinion.

APPENDIX C

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
HEALTH SERVICES DIVISION

M E M O R A N D U M

To:

Hospitals and Medical Facilities for the Termination of Pregnancy

From:

Licensing and Certification Section
Offiice of Planning and Health Facilities

Subject:

Amendment To Abortion Regulations

The Washington State Board of Health took action at its April 5, 1973, meeting to amend the Medical Facility for Termination of Pregnancy Rules and Regulations, WAC 248-140, to bring them into line with the recent United States Supreme Court decisions on abortions. The following regulations are in effect for 90 days beginning April 9, 1973.

"WAC 248-140-150 HOSPITAL FACILITIES APPROVED FOR TERMINATING PREGNANCY. For the purpose of preserving and protecting maternal health, all abortions performed during the second trimester of pregnancy shall be performed only in hospitals licensed pursuant to chapter 70.41 RCW: PROVIDED, That a termination of pregnancy during the second trimester may be induced in a facility other than a licensed hospital so long as final termination takes place in a licensed hospital: PROVIDED

FURTHER, That abortions during the second trimester may be performed outside licensed hospitals when the physician has determined that termination of the pregnancy was immediately necessary to meet a medical emergency.

WAC 248-140-152 FINDING OF EMERGENCY. The board of health finds that the immediate adoption of these rules is necessary for the preservation of the public health, safety and welfare.

The effect of this amendment is to repeal from WAC 248-140 sections WAC 248-140-020 through WAC 248-140-130 and to add the above quoted sections to WAC 248-140-010, the purpose statement of these rules and regulations.

The State will no longer regulate or issue certificates to facilities performing a first trimester termination.

During the second trimester, hospitals licensed under RCW 70.41 are the only medical facilities approved by the Board of Health for termination of pregnancy (RCW 9.02.070). At this time, no approval is required for those non-hospital facilities where a second trimester termination is induced. Where second trimester terminations are induced in a non-hospital facility, the final termination must take place in a licensed hospital. The Board of Health will consider permanent adoption of amendments to WAC 248-140 at a public hearing in Olympia on June 7, 1973.

TR:kh

(Letterhead of Washington State Hospital Association)

BULLETIN

June 8, 1973

No. 1756
To: Administrators
From: Curt Fortney, associate director
Re: Board of Health on Abortions and Nurseries

The Washington State Board of Health, meeting in Olympia yesterday, took action in two areas of particular interest to hospitals.

ABORTION

The Board approved new regulations which permit abortion during the second trimester to be induced in a facility other than a hospital provided that final termination takes place at a hospital. The board also approved a regulation to allow abortions to be performed during the second trimester outside licensed hospitals when a physician has determined that termination of the pregnancy was immediately necessary to meet a medical emergency.

In cases where an abortion is induced outside the hospital and terminated inside the hospital the physician will make a report on the first part of the procedure and the hospital will report only upon the portion of the procedure accomplished at the hospital. The State Division of Health will provide new forms for this purpose in the near future.

HOSPITAL NURSERIES

The Board changed existing requirements that nurses and other personnel regularly assigned to the nursery "shall wear short-sleeved scrub dresses or uniforms with a clean gown and should wear masks."

The new language reads: "Nurses and other personnel regularly assigned to the nursery shall wear short-sleeved scrub dresses or uniforms covered with a clean, long-sleeved gown." The requirement for masks has been deleted.

A second change provides that all persons not regularly assigned to the nursery shall wear a clean, long-sleeved gown before handling infants or coming in contact with clean equipment such as bassinets, incubators and examining tables. The old requirement that caps and masks be worn was deleted.

The third change concerns handwashing. Previously the regulations stated that "strict handwashing techniques shall be maintained by physicians and nurses." The new rule reads: "Prior to touching babies or clean equipment such as bassinets, incubators, and examining tables, all persons must wash their hands. Handwashing is required before handling each baby. The handwashing procedure shall be that approved by the infection control committee."

The new regulations will be effective thirty (30) days after the regulations are published probably next week.

SUPREME COURT, U.S.
MAR 12 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-935

THE CHICAGO BOARD OF HEALTH, and DR. ERIC OLDBERG, SAMUEL A. GOLDSMITH, WALTER MULLADY, DR. MARY KELLY MULLANE, DR. ROBERT STEPTO, EDWARD W. HUESEY, and MICHAEL ROSENBERG, Individual Members of the Chicago Board of Health,

Petitioners,

vs.

FRIENDSHIP MEDICAL CENTER, LTD. and T. R. M. HOWARD,

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

THIS COURT'S HOLDING THAT THE RIGHT OF PRIVACY INCLUDES THE ABORTION DECISION ASSUMES THAT ABORTIONS ARE PERFORMED UNDER SAFE, CLINICAL CONDITIONS.

Respondents' Brief in Opposition to the Petition for a Writ of Certiorari makes it readily apparent that the

definition of the right of privacy is of decisional magnitude in this case. Predictably, respondents argue that in *Roe* v. *Wade,* 410 U.S. 113 (1973), this Court so defined the woman's right of privacy as to preclude the challenged Board of Health regulations for Abortion Clinics. It is submitted that a right of privacy of such breadth passes well beyond the penumbras of the specific Constitutional guarantees from which the right is derived. Review by this Court is necessary to prevent the unwarranted expansion of the privacy concept.

The fact that the right of privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy" provides no authority for the rule that the right limits regulation of abortion facilities to maintenance of sanitary facilities and enforcement of building code standards. This Court's comment on *Roe* v. *Wade* in *Paris Adult Theatre* v. *Slaton,* 413 U.S. 49 (1973) leads to an opposite conclusion. Citing *Roe* and *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), this Court stated that the constitutionally protected privacy of family, marriage, motherhood, procreation and child rearing is concerned "with a protected intimate relationship." *Id.* at 66.

In the same manner in which privacy requires that the abortion decision be unfettered by the existence of criminal abortion statutes, the right of privacy recognized by the *Griswold* Court was broad enough to preclude a Connecticut law which interfered with the decision whether or not to conceive a child. In *Griswold,* this Court stressed that the right of privacy mandated the invalidation of that portion of the law that proscribed the *use,* as opposed to the manufacture, sale, or other distribution of contraceptives. 381 U.S. at 485, 486. Thus, the right of privacy is

not all-encompassing, but has been narrowly drawn by this Court.

In the instant case, a physician and his abortion clinic have been granted shelter under the umbrella of a woman's right of privacy. By invalidating the regulations on the basis of a woman's right of privacy, the Court of Appeals has blunted the real issue of whether an abortion clinic performing numerous first trimester abortions is now beyond the pale of Board of Health supervision. Certainly, requiring an abortion clinic to have a sink or an elevator does not invade any fundamental right of a woman. Indeed, the plaintiff in *Roe* v. *Wade* alleged that she sought an abortion "performed by a competent licensed physician under safe, clinical conditions."

Although this Court took notice of various scientific and medical data in reaching its decision in *Roe*, none of the data demonstrated the safety of first trimester abortions in clinics where health and sanitation requirements are not enforced. The Seventh Circuit has seriously erred in resolving the empirical uncertainty of the safety of unregulated clinics in the name of a woman's right of privacy. Given the graveness of the Court of Appeals' assumption and the importance of the scope of the right of privacy, this case requires review by this Court.

II.

RESPONDENTS ARE IN COMPLIANCE WITH THE CHICAGO BOARD OF HEALTH REGULATIONS. THEREFORE, THIS CASE PRESENTS NO CASE OR CONTROVERSY.

Respondents do not argue that the challenged regulations present an actual threat of harm to them. Since the Friend-

ship Clinic is an abortion facility in full compliance with the Board of Health Regulations, the claims of respondents do not present a real case or controversy. Moreover, any fear of arrest is plainly fictional. Section 9-5 of Chapter 9 of the Municipal Code clearly specifies arrest as the penalty for one who "violates any health provision of this code." "This code" plainly refers to the Municipal Code of which the regulations are not a part.

Furthermore, a party may not seek vindication for the constitutional rights of others. *Moose Lodge* v. *Irvis*, 407 U.S. 163 (1972); *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). The Court of Appeals erred in granting respondents vicarious standing to assert their potential patients' rights of privacy.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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March 11, 1975